PROCEEDINGS

OF THE

AMERICAN PHILOSOPHICAL SOCIETY

HELD AT PHILADELPHIA FOR PROMOTING USEFUL KNOWLEDGE.

VOL. XXXIX. SEPTEMBER, 1900. No. 163.

THE DEVELOPMENT OF LAW AS ILLUSTRATED BY THE DECISIONS RELATING TO THE POLICE POWER OF THE STATE.[1]

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The Crowned Essay for which the Prize of two thousand dollars was awarded, on June 19, 1900, from the Henry M. Phillips Prize Essay Fund, by the Committee of Judges appointed by the American Philosophical Society held at Philadelphia for Promoting Useful Knowledge.

(*Read June 19, 1900.*)

Es ist an einem andern Orte dargelegt dass das Recht seinem Inhalt nicht aus der Entwicklung des Rechtsbegriffes, sondern aus dem Leben empfängt für welches es gilt. Dieses Leben ist daher die rechtsbildende Kraft.—*Stein*, "*Handbuch*," *S. 41.*

Platon remercioit le ciel de ce qu'il étoit né du temps de Socrate; et moi je lui rends grâces de ce qu'il m'a fait naitre dans le gouvernment, où je vis, et de ce qu'il a voulu que j'obéisse, a ceux qu'il m'a fait aimer.—*Montesquieu*, "*L'Esprit des Lois*," *Preface.*

CHAPTER I.

INTRODUCTION OF THE TERM THROUGH EARLY FEDERAL DECISIONS.

The Police Power is a well recognized if not yet fully defined department of constitutional law. It is also the newest one of anything near equal importance. The 1898 edition of Bouvier's *Law Dictionary* says that the law on this subject is all of recent growth, and most of it is in the last half of the nineteenth century. It could not consistently say otherwise. The work as originally published in 1839 did not define the phrase "Police Power" nor even contain it. The thirteenth edition in 1867 did not have it. It was only in 1883 that this standard dictionary of law first ex-

[1] Copyrighted, 1900, by W. G. Hastings.

plained the phrase. The voluminous *United States Digest* did not include the phrase, either in its original edition or in its revision in 1873, among its separate headings, nor among its subdivisions of constitutional law. It was not until 1879 that it began to appear among the subdivisions of constitutional law in the annual supplements of that work.

It is, as appears clearly enough from our decisions, a branch of constitutional law peculiar to countries having legislatures with limited power. It is an outgrowth of the American conception of protecting the individual from the state. It originated in connection with the discussion of the limitation on the legislative powers of the states under our federal system. The name itself seems to have been introduced by Chief Justice Marshall in the case of "Brown *vs.* Maryland" in 1827. A somewhat careful search for the phrase fails to find it in legal or political writings of this country prior to that time. The combination of its terms seems to be still unknown on the other side of the Atlantic, notwithstanding that both words come to us from the French, and its suggestion is distinctly traceable to Montesquieu.

It was entirely natural that it should appear in a decision of our Federal Supreme Court and from Chief Justice Marshall.

Sir Henry Maine says, that popular government in modern times was first redeemed from general distrust and suspicion by the overwhelming success in the United States of a body of Englishmen, who from circumstances

> "had never had much to do with an hereditary king and an aristocracy and who had determined thenceforth to dispense with them altogether."[1]

With all deference to a great name, the absence of kings and nobles was not the governing feature of the situation when the fathers of the republic took in hand the task of framing that government which was to take away forever, let us hope, the ill fame of popular institutions. The condition which was the most important factor seems to have been this: that body of Englishmen of American birth to whom the great task fell were already organized into thirteen states to which they were enthusiastically attached. These states from their origin had been in most respects

[1] *Pop. Govt.*, p. 11.

governed by elective legislatures with limited powers under the sovereign supervision of Great Britain.

In settling this country, whether from circumstances or from a race instinct which had been before exemplified in the Saxon Heptarchy, they divided into several separate communities. Here they had no Danes to the east, no Scotch or Irish to the north and west, no French upon the south to hammer them into a single state by repeated blows. Barely enough of threats and pressure from the outside they had to maintain the feeling of common origin and common destiny. Even this was maintained more by the common bond that united them all to the mother-country. That mother was sometimes severe, often selfish and still more often negligent. They could, however, look with confidence to her to protect them from other European interference. Such enemies as they had on this side of the ocean they soon proved able to cope with in their own strength.

Their distance, the peculiarities of their situation and their own self-reliance was a guarantee sufficient that men who had been taught to work such organizations would form local legislative bodies, and they did. Their own weakness and the temper of the British government was an assurance that its sovereignty over them would not be forgotten. The legislative powers of the colonial assemblies in the nature of things must expand with every step in the growth of the colonies, and however clearly the limitation on those powers, imposed by the sovereignty of the British Crown and Parliament, might be marked in theory, a wider and wider function must necessarily fall to these colonial legislatures.

The British doctrine of the supreme authority of Parliament soon collided with these growing legislative powers, and when the two became incompatible it was thrown off. The confederation of the colonies was brought about by the revolutionary struggle and lasted through it, although in the meantime its weakness became thoroughly apparent. It proved entirely ineffectual to hold together the thirteen colonies after peace. So it came that when the problem of putting an efficient substitute in the place of the confederation was met, the most important element in that problem was the existence of the thirteen state governments that were occupying the ground. The confederation was dead and, as the Hibernicism has it, was conscious of it. It offered no resistance.

The thirteen colonies, fortunately, had, for the most part, con-

stitutions made to fit the articles of confederation. Those still living under their colonial charters, of course, had organizations designed to work in subordination to Great Britain. All were thus intended from the beginning to operate under some sort of external authority. Such adaptation had not been difficult for a people who, with large freedom for self-government, had from the beginning down to the commencement of revolutionary troubles been sincerely loyal to the British Crown and gloried in its supremacy. Many of the state constitutions of the colonies had been adopted during the struggle for independence, and under such circumstances these constitutions naturally were not of a separatist character.

There seemed to these "Englishmen" of America at that time nothing absurd or impossible in the idea of a divided political sovereignty. That sovereignty, or what they, following Vattel and Blackstone,[1] regarded as such, the power to make and enforce laws, was indivisible, they utterly denied. Hamilton in *The Federalist*[2] answered the objection that sovereignty was indivisible, simply by saying that it is absurd to argue the impossibility of what both is and has been. So when they found the confederation could not care for their common interests, and that the formation of separate confederacies was imminent, moved not by fear of enemy from without, but by that spectre of "states discordant, dissevered, belligerent," which so haunted Webster to the end of his life, and so prophetically as events proved, they proceeded to build after the model of their several state governments a national government extending over the whole but resting down directly upon the people to which should be committed just those common interests of the states and nothing else. So much of the old fabric of the confederation as they could use was employed. The rest they threw away.

The very completeness with which the state government had already occupied the ground became, and still constitutes, the prime condition of the success of the national organization. This fact rendered possible the complete specialization of the national government for national purposes, which at once makes it strong for such purposes and prevents conflict with local authority. This specialization of action on the part of the general government was

[1] *Blackstone Com.* i, 49; *Le Droit des Gens*, sec. 38.

[2] *Federalist*, No. 39, Lodge edition, p. 195.

not made by means of definitions, but by assigning it functions, and functions already waiting to be taken up, which the states, in adopting the constitution, recognized their own inability to perform. Hence the marvel of that successful working of this complex machine, which Bagehot said he would have had no hesitation in saying beforehand was impossible.[1]

The remnant of power left in the states, after making room for this federal "supreme law of the land," is called by the authors of *The Federalist* the "residuary sovereignty,"[2] but that name seems not to have obtained generally, perhaps because it served no one's political needs. It is hard to find it outside of *The Federalist*. It suited those who wished to magnify the states and who feared the growth of power on the part of the national government to omit the qualifying adjective. It suited those to whom encroachments and separatist tendencies on the part of the states were a terror not to couple the words "States" and "Sovereignty" together, even with the qualification. So this truncated sovereignty remained without a name, and the powers exercised by the states were specially designated by various terms as "power of taxation," "eminent domain," "public justice," and "police regulations."

The introduction of the term "Police Power" seems to have been by Chief Justice Marshall, and it came to him by degrees. In the Dartmouth College case itself, he seems to have clearly prefigured in his mind the principle that was later to be used so successfully in limiting the extension of the doctrine of corporate inviolability contained in that decision. He does not, it is true, in terms mention the Police Power. Neither did the great lawyers who argued that case. He says, however,[3]

"that the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions adopted for internal government, and that the instrument they have given us is not to be so construed may be admitted."

The Dartmouth College case,

"that remarkable result of the disagreement of two clergymen, both of

[1] *British Constitution*, Chap. 8.

[2] *Federalist*, No. 39, p. 238, Lodge's edition. *Id.*, No. 43, p. 275. *Ia.*, No. 62, p. 386.

[3] *4 Wheat.*, 629.

whom were employed in the same institution of learning, as to the relative merits of the Congregational and Presbyterian church creeds and church governments, which has produced such effects on business and legislation in this country,"

was decided in 1819. In 1824, in deciding the case of Gibbons *vs.* Ogden, the chief justice comes still nearer the conception and the word:

"If Congress licenses vessels to sail from one port to another in the same state, the act is supposed to be necessarily incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce in the state or to act directly on its system of police."[1]

Again, a little farther on in that opinion that has done so much toward the unifying of our country he said:

"The acknowledged power of the state to regulate its police, its domestic trade and to govern its own citizens may enable it to legislate on this subject to a considerable extent."[2]

Again, a little farther on, after commenting on the argument that the word "regulate" gave Congress an exclusive power and declining to decide that, he adds:

"Since, however, in exercising the power of regulating their own *purely internal affairs whether of trading or police*, the states can sometimes enact laws the validity of which depends upon their interfering with and being contrary to an act of Congress passed in pursuance of the constitution, the court will enter upon the inquiry whether the laws of New York, as expounded by the highest tribunal of that state, have in their application in this case come into collision with an act of Congress and deprived a citizen of a right to which that act entitles him."[3]

He has not yet quite reached the term, but the conception is almost, if not quite, complete. In this case, as in the Dartmouth College case, the thought is suggested by the arguments of counsel and clarified in statement by the chief justice.

Three years later, in 1827, in Brown *vs.* Maryland,[4] he had under consideration a requirement by that state, that every importer of foreign goods should, before selling them, obtain a license and pay for it fifty dollars. He was pressed by Taney's ingenious argument, that to hold this a violation of the constitu-

[1] 9 *Wheat.*, 204.
[2] 9 *Wheat.*, 208.
[3] 9 *Wheat.*, 210.
[4] *12 Wheat.*, 419.

tional prohibition against the state's taxing imports, and also of the clause giving Congress the regulation of foreign commerce, would cripple the state at once in both its power of taxation and its power to protect itself against dangerous importations, such as gunpowder; and the states would be powerless to prescribe proper regulations for the handling of such articles in the protection of their citizens. Taney's claim was, that the force of the constitutional provision must cease when the goods were landed and placed in store, or the state lose all control of traffic that might be in the last degree dangerous and state and citizens alike be deprived of the right of self-preservation.

The chief justice denied the consequence, but not the right of the state, in holding the act of the state repugnant both to the constitutional provision against a state tax on imports and to various acts of Congress establishing duties on imports. He referred to the example brought by his future successor in these terms:

"The power to direct removal of gunpowder is a branch of the police power which unquestionably remains and ought to remain with the states."

This seems to be the advent of the phrase into legal discussions in this country. An examination of various writings where it would naturally occur, if already in use, does not find it. It is noticeably absent from the opinion of Attorney-General Wirt[1] as to the constitutionality of the South Carolina laws excluding free colored seamen from her port. This opinion was given in 1824, three years before the decision of Brown *vs.* Maryland, and the phrases of Gibbon *vs.* Ogden concerning the powers of the state are the ones reproduced in it.

The case of Brown *vs.* Maryland did not suffice to put the phrase "Police Power" into immediate currency. The opinion of Attorney-General Berrien given in 1831,[2] in contradiction to that of Mr. Wirt, also contains no use of these terms. The phrase would inevitably occur in any similar discussion within the last fifty years, but both of these eminent lawyers use the terms "right to maintain its own police regulations," "established regulations of police" and similar phrases such as Blackstone and Kent both

[1] *Ho. Rep.*, No. 80, 3 Sess. 27th Cong.
[2] *Ho. Rep.*, No. 80, *supra*.

furnish, and such as abound in *The Federalist.* Indeed, John C. Calhoun in his famous resolution of 1837[1] does not yet use the combined phrase. He claims for the states "the exclusive and sole right over their own and domestic institutions and police." But it was in these times of exciting discussion as to the nature of the Union that the phrase did become current. After remaining buried for ten years in the official report of the case of Brown *vs.* Maryland, and when its author had gone to his last sleep, it was brought forth in 1837 once more, and was not soon to go to rest again.

The case of the Mayor of the City of New York *vs.* Miln[2] had been argued before the court in Marshall's lifetime, in 1834. The chief justice had announced that, excepting in cases of absolute necessity, decisions on constitutional questions would not be rendered unless four judges, then a majority of the court, should concur. In this case there had not been such a concurrence, and it was ordered to be reargued. In 1836, Taney had succeeded Marshall. Before that Wayne had taken Johnson's place, and shortly after Barbour was to take Duvall's. Johnson had died in 1834. Taney had been nominated to Johnson's place, and the influence of Clay and Webster combined had prevented the confirmation, although Marshall had done all that he thought consistent with the position of chief justice of the court to procure the confirmation. After Marshall's death in 1835 Taney was appointed chief justice and his appointment this time confirmed, and with the court thus completed the case of the Mayor of New York *vs.* Miln was again argued and the opinion rendered in 1837 by Judge Barbour.

The question was whether an act of the state of New York requiring the master of every vessel arriving at that port to render to the city authorities within twenty-four hours after such arrival a statement of the name, place of birth, legal settlement, age and occupation of every passenger coming from a foreign country or other state, and fixing a penalty of twenty-five dollars upon master, owners and consignee for each passenger not so reported, was a valid law, or was void as being repugnant to the power of Congress to regulate foreign and interstate commerce and to acts passed in pursuance of such power. The court found the act valid. Judge Story dissented, and declared that the late chief justice had held

[1] Calhoun's works, Vol. iii, p. 140.

[2] *11 Pet.*, 102 (1837).

the opinion that the act was unconstitutional and an infringement on the power of Congress.

In the opinion, Judge Barbour quotes Marshall's words in Brown *vs.* Maryland, as follows:

[1] "The court admits the power of a state to direct the removal of gunpowder as a branch of the police power which unquestionably remains and ought to remain with the state."

Judge Thompson in his concurring opinion says:

[2] "Can anything fall more directly within the police power and internal regulation of the state than that which concerns the care and management of paupers or convicts or any other class or description of persons that may be thrown into the country and likely to endanger its safety or become chargeable for maintenance?"

Just above this he, too, quotes from Brown *vs.* Maryland the remark that control of the removal of gunpowder is a branch of the police power of the state.

That the phrase was not yet the recognized and accredited representative of the idea or ideas involved is shown clearly enough by these two opinions. It occurs only in the connection given, and it evidently occurs there only because of the dead chief justice having used it in Brown *vs.* Maryland. Elsewhere throughout the two opinions Justices Barbour and Thompson both use the phrases of Blackstone and *The Federalist*—"Power of state to regulate its police," "Internal police of the state," "Power to regulate internal police," "Powers to enact such laws for her internal police as it deems best," "Purely internal affairs whether of trading or police," and the law is styled "A mere regulation of internal police." The conclusion is announced that "The act is not a regulation of commerce but of police." These are all phrases drawn apparently through Blackstone, *The Federalist*, and James Wilson from Montesquieu.[3]

The test of the distinction between regulations of commerce and those of police is sought in the end proposed by the legislature and the means used. The end is found to be to prevent the commonwealth of New York from being burdened by the influx of an undesirable population from foreign countries or other states. The means for

[1] *11 Pet.*, 142.

[2] *Id.*, 148.

[3] *L'Esprit des Lois*, Book 20, chap. 14; Book 26, chap. 24; Book 26, chap. 11.

that purpose provided in the act under consideration was an immediate report from shipmasters of names, places of birth, etc., of all passengers, that the city authorities might take the necessary steps to prevent their becoming a public burden as paupers or criminals. Marshall in Gibbon *vs.* Ogden is quoted as to the

[1] "immense mass of legislation not surrendered to the general government, all of which can be most advantageously exercised by the states themselves."

The place in which the act takes effect is wholly within the state. Marshall's opinion in Gibbon *vs.* Ogden is once more quoted for his luminous remark that

[2] "if a state in passing laws on a subject acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one Congress may enact, it does not derive its authority from the particular power which has been granted to Congress, but from some other which remains with the state, which, however, may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguished from each other, may flow from distinct powers, but this does not prove them identical, although the means used in their execution may sometimes approach each other so nearly as to be confounded, yet there are certain situations in which they are sufficiently distinct to establish their individuality."

Judge Barbour finds the authority for the state of New York to pass the statute under consideration in what would now at once be called the "Police Power," although, as stated above, he only uses the phrase in quoting from Chief Justice Marshall. He says he places himself upon

[3] "impregnable positions" "that a state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation where that jurisdiction is not surrendered or restrained by the constitution of the United States; that by virtue of this it is not only the right but the bounden and solemn duty of a state to advance the safety, happiness and prosperity of its people and to provide for its general welfare by any and every act of legislation which it may deem conducive to these ends where the power over particular subject or the manner in which it is exercised is not surrendered or restrained in the manner just stated; that all those powers which relate to merely municipal legislation or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained, and that

[1] 9 *Wheat.*, 203. [2] *Id.*, 204. [3] *11 Pet.*, 139.

consequently, in relation to these, the authority of the state is complete, unqualified and exclusive."

"We are aware," he continues, "that it is at all times difficult to define any subject with proper decision and accuracy. If this be so, in general, it is emphatically so in relation to a subject so diversified and multifarious as the one which we are now considering. If we were to attempt it, we should say that every law came within this description which concerns the welfare of the whole people of the state or any individual within it, whether it related to their rights or their duties; whether it respected them as men or as citizens of the state; whether in their public or private relation; whether it related to the rights of persons or of property of the whole people of the state or of any individual within it, and whose operation was within the territorial limits of the state, and upon persons and things within its jurisdiction. But we will endeavor to illustrate our meaning rather by exemplification than by definition."

He proceeds then to illustrate this power by the extent to which these same passengers and shipmasters and owners would be subject to the jurisdiction of New York in civil and criminal actions to enforce liabilities they might be under or punish offenses they might have committed, all in total disregard of the fact that they were passengers from a foreign country, or their vessel engaged in foreign or interstate commerce.

Evidently what the court was in this case deciding was simply that the law in question was a proper exercise of what is called in *The Federalist* "the residuary sovereignty of the state." Notwithstanding Judge Story's dissent and his assertion that Marshall was with him in thinking the law unconstitutional, it is possible now to conclude that it was so even on Marshall's own principles. This appears from the [1] comment on the case in the *North American Review* which followed the publication of the official report of it in the eleventh volume of *Peters' Reports*. This case appeared in that volume, together with the famous cases of Briscoe *vs.* Bank of Kentucky and Charles River Bridge *vs.* Warren Bridge. The reviewer, who thinks they make a great new departure on the part of the Supreme Court and who mourns bitterly the way things have changed since the great chief justice died, admits that there would be little to complain of in the result of the decision if it were a new question and the result not upheld by such radical reasoning. The objection he urges is that it marks a change of tendency on part of the court and a disposition to uphold the authority of the

[1] Vol. 46, p. 126.

states as against that of the general government. In fact, his only serious objection to Judge Barbour's reasoning is that it results in his finding an authority in the state "complete, unqualified and exclusive."

The reviewer does not use or note the phrase "police power." This review, like the opinions filed in the case, shows how far the phrase still was from occupying the field. The famous case of [1] Charles River Bridge *vs.* Warren Bridge furnishes a still stronger proof that the phrase had not yet established its position. This case, as above stated, appeared also in the eleventh volume of *Peters' Reports*. Chief Justice Taney's opinion of the court, with Justice McLean's concurring opinion on the ground of want of jurisdiction and the dissenting opinion of Judge Story altogether cover one hundred and fourteen pages of the book. The court is believed to have intended to set up the police power, as since understood, to serve as a limit upon the doctrine of the Dartmouth College case. The holding is that a state charter to a bridge company which does not in terms grant any exclusive rights cannot be construed into a contract on the part of the state not to make or authorize to be made another bridge over the same stream in the immediate vicinity of the first, nor to prevent the turning of the second bridge into a free public one to the ruin of all value in the first franchise.

The powers of legislation left with the states, and the relation of those powers to the prohibition in the federal constitution against the impairing on the part of any state of the obligation of contracts, is the subject of Chief Justice Taney's profound investigation. Perhaps they have never been set forth in better or more impressive terms. But the nearest he comes to using the phrase "police power" is in this statement:

"We cannot deal thus with the rights reserved to the states and by legal intendments and mere technical reasoning take away from them any portion of that power over their own internal police and improvement which is so necessary to their well-being and prosperity."[2]

With the question whether vested rights were disturbed the court declines to concern itself under the constitution as it then existed. The other opinions in the great Bridge case contained nothing even suggesting the name by which this power is now known.

[1] *11 Pet.*, 420 (1837).

[2] *11 Pet.*, 552.

At the time of the rendition of these two judgments, City of New York against Miln and the Charles River Bridge *vs.* Warren Bridge, the question of the relations of the states to the federal government had become a burning one. The nullification controversy had come and gone, or rather had been compromised. This had scarcely dealt directly with the powers reserved to the states. It had rather concerned itself with the question of what the national government might do in executing its own admitted functions. As a result of it, however, the states were pushed forward by Calhoun and his supporters. The discussion showed that open defiance of the federal government would not be supported, at least with Andrew Jackson at the head of that government and with Webster in the Senate to explain its constitution; but behind nullification was the slavery controversy.

In 1831 Garrison had established his *Liberator*, and had gotten into jail because of it. He had become, in the eyes of many, a martyr for liberty. The slave rising at South Hampton, with the slaughter of some sixty white people, had taken place shortly afterward. Then Calhoun had precipitated his famous slavery debate and begun to preach his cult of state sovereignty. The irritating controversy over the South Carolina exclusion laws had been going on for some years. Marshall then died. By the act of March 3, 1837, just as these decisions were published, three new judges had been added to the number constituting the Supreme Court, with the design, as many thought, of overruling his federalist judgments. Public attention was, therefore, at once called to this case of the City of New York *vs.* Miln, and to the sustaining of the power of the state to enact the restrictions against shipmasters and ship-owners, brought by this case to the consideration of the court, and to the terms of the decision. President Jackson, in his annual message to Congress in 1835, had made his famous recommendation that abolition literature be excluded by act of Congress from the mails, and Calhoun and the Senate had reported that Congress had no authority to do so.

The pungent phrase of Judge Marshall was adapted for a catch word. The very indefiniteness of the conception under it compelled a definite word in popular discussion. The vast and vague notion of the powers of the state, rendered still more so by taking from it the still more vague conception of the national government and its powers, manifestly never would do to make a popular catch

word in stump speeches, newspaper articles and street-corner discussions. If a subject is not simple, treat it nevertheless as if it were and trim it into simple phrase, is the rule of the newspaper and the hustings. There was no candidate among all the phrases that discussions had to that time developed that could compare with Marshall's "police power" as a brief formula for the expression of the federalist idea of the state's functions in the federal system. So into the current discussion it went.

The glibness with which politicians were now soon talking about the Police Power, and citing the case of the City of New York *vs.* Miln, is shown by House Report No. 80, third session of the Twenty-seventh Congress. An examination of this report and the documents accompanying it, and the comparison of these with antecedent state papers and writings upon similar subjects, would seem sufficiently to indicate the genesis of the term. The resolutions offered by Mr. Winthrop in connection with the report show how completely the term had gotten into legal and popular use by 1843, and also its relation to the burning political questions then already preparing the country for civil war.

They are, First, That the arrest and imprisonment of colored seamen from other states without charge except that of entering a port of the United States on lawful business is a violation of article 4, section 2, of the constitution of the United States. Second, The seizure of such seamen from foreign vessels entering our ports is a breach of comity and of treaty rights, and a violation of article 6 of the constitution of the United States. Third, Laws forbidding seamen of other states or countries from entering ports on lawful business are a violation of the exclusive power of the general government to regulate commerce. Fourth,

"Police Powers of states can justify no enactment or regulations in direct, positive and permanent conflict with express provisions or fundamental principles of the National Compact."

These resolutions show the currency of the phrase. Mr. Rayner, in his minority report, no less than Mr. Winthrop for the majority of the committee, makes the same use of the terms, and the report sufficiently shows that the source is the case of Mayor of New York *vs.* Miln, just as that case in turn shows that it derives them from Judge Marshall's opinion in Brown *vs.* Maryland. These resolutions were, on March 2, 1843, tabled in the House of Repre-

sentatives by a vote of eighty-six to fifty-nine without discussion on the part of their opponents. Even then few ventured to dispute the constitutional principles declared in them. However this declaration was treated, the "Police Power" was thenceforth to be retained within the jurisprudence as well as in the politics of America and under that title. We have seen the term "Police Power" originate in Brown *vs.* Maryland, and brought into currency in the case of New York *vs.* Miln. Its next appearance in the federal Supreme Court, no longer used tentatively and as a briefer substitute for fuller expressions, is in [1] Prigg *vs.* Pennsylvania in 1842. In this case the Fugitive Slave law and the right of a state to legislate on the subject of the rendition of fugitive slaves first came before the Supreme Court. It had no difficulty in agreeing that the law of Pennsylvania under which the plaintiff had been indicted and found guilty of removing a mulatto woman by force from Pennsylvania into Maryland was repugnant to the acts of Congress on that subject, and therefore void.

The judges, however, could not agree as to whether Congress alone might legislate on this subject, or whether the states also might take action to enforce the constitutional right to such rendition of fugitive slaves, so long as they did nothing contrary to the acts of Congress. Those of the judges who were able to agree among themselves on that subject were unable to agree as to why they agreed about it, and so, after the fashion which began to prevail in that court after the death of Chief Justice Marshall, all of the judges except two gave separate opinions.

Judge Story gave the opinion to the court, and after holding in terms almost as sweeping as those which were afterward to arouse so much indignation in the Dred Scott case that the constitution recognized property in slaves, after saying that the right to hold slaves and claim their extradition is

"an absolute and positive right and duty pervading the whole Union with an equal and supreme force and uncontrolled and uncontrollable by state sovereignty or state legislation,"

he holds that the maintenance of such right so established by national authority is confided solely to Congress as the national legislature. Then, as he says,

[2] "to guard against any possible misconstruction" . . . . "we are by

[1] *16 Pet.*, 539 (1842). [2] *16 Pet.*, 625.

no means to be understood in any manner whatsoever to doubt or interfere with the police power belonging to the states in virtue of their general sovereignty. That police power extends over all the subjects within the territorial limits of the state, and has never been conceded to the United States" . . . . "It is entirely distinguishable," he says, "from the right and duty of claiming and delivering slaves which comes from the constitution of the United States."

He has no doubt of the jurisdiction of the state in exercise of such police power to arrest, restrain or remove runaway slaves, like other evil-doers.

"The rights of the owners like those of other property holders are held subject to this police power." "But such regulations can never be permitted to interfere with or obstruct the just rights of the owner to reclaim his slaves derived from the constitution of the United States, or with the remedies prescribed by Congress to aid and enforce the same."

In the same case Chief Justice Taney's concurring opinion, while disagreeing as to the exclusiveness of the right in Congress to legislate on the matter of fugitive slaves, also discusses the relation of that subject to the police power, or, as he calls it, "police powers." Evidently, it was hard for the great lawyer to take up the new phrase, and harder still for his logical mind to ignore the incongruous elements embraced within it. The logic with which he assails Judge Story's assertion of complete exclusiveness of right on the part of Congress to deal with this fugitive slave question is interesting in itself, and still more so in its relation to the later cases, notably the "original package case" of Leisy *vs.* Hardin,[1] and its assertion of a like exclusive power in Congress over interstate commerce.

It seems hard to avoid Judge Taney's[2] conclusion that legislation of the states which contravenes neither the right as granted by the Constitution, nor the remedies enacted by Congress for its violation, must be unobjectionable. We are not, however, at this moment so much concerned with this question of exclusiveness of Congressional power. Its connection with the development of the police power was then disclosed only in the beginning. The long debate among the Supreme judges as to whether legislation of the states on various commercial subjects should be sustained as an exercise

[1] *135 U. S.*, 100.

[2] See Webster's speech of March 7, 1852, in Senate.

of the police power, or as the employment of a subordinate authority in the states to legislate upon interstate and foreign commerce in fields where Congress had not yet entered, was here a little varied. The question here was whether the police power of the states was a distinct and exclusive or a related one and concurrent with that of Congress over fugitive slaves.

After discussing unsatisfactory results that might ensue if the states were not permitted to legislate in certain ways as to fugitive slaves the Chief Justice says,

"It seems supposed that laws nearly similar to those I have mentioned might be passed by the state by virtue of her powers over her internal police, and by virtue of her right to remove from her territory disorderly persons. . . . . But it would be difficult, perhaps, to bring all the laws I have mentioned within the legitimate scope of the internal powers of police. . . . . It has not heretofore been supposed necessary in order to justify these laws to refer them to such questionable powers of internal and local police." [1]

Judge Thompson concurred in thinking state legislation necessary sometimes and proper when not contradictory of the acts of Congress or the federal constitution, but he enters upon no discussion of the relations of the subject to police power. Judge Wayne held the opposite view with a like silence except to deny all right of legislation over this subject to the states except such "as may be of a strictly police character." Justice Daniel followed on the other side with numerous citations from City of New York *vs.* Miln and free use of the term police power, and calls attention to the fact that dealing with the fugitive, merely as such, so long as he neither disturbs or threatens the domestic tranquility, is a matter of foreign relations and not of police:

"Under such circumstances he would not be a proper subject for the exertion of police power. If not challenged under a different power of the state, his escape would be inevitable." [2]

If arrested by the exercise of the police power he would, as far as he was subjected to that power of the state, "be taken out of that of his master," and thus the invocation of this police power, so far from securing the rights of the master, would "be made an engine to insure the deprivation of his property."

Justice McLean in his turn takes up the controversy in such

[1] *16 Peters*, 632–3. [2] *Id.*, 658.

terms that in disposing of the relations of state and federal governments he loses sight of both slave and master, and does not in the end distinctly indicate whether he thinks the latter was or was not rightly convicted under the Pennsylvania law. His main argument as to whether the article of the constitution in question was designed merely to protect the rights of the slaveholders against states opposed to them, and, therefore, that to suppose any effective power toward the enforcement of that article to be left in the hands of those against whom it was to operate, would be utterly absurd and a fallacy from which the framers of the constitution must be presumed exempt, is fortunately no longer a matter of much practical moment.

He continues, however:

[1] "I come now to a most delicate and important inquiry in this case, and that is, Whether the claimant of a fugitive from labor may seize and remove him by force out of the state in which he may be found in defiance of its law? I refer not to the laws which are in conflict with the constitution or the act of 1793. Such acts I have already said are void. But I have reference to those laws which regulate the police of the state, maintain the peace of its citizens and preserve its territory and jurisdiction from acts of violence."

He adds later:

[2] "If the master may lawfully seize and remove a fugitive out of the state where he may be found without an exhibition of his claim, he may lawfully resist any force physical or legal which the state or any of its citizens may interpose. . . . . The master exhibits no proof or right to the services of the slave, but seizes and is about to remove him by force. I speak only of the force exerted on the slave. The law of the state presumes him to be free and prohibits his removal; now which shall give way, the master or the state? It is a most important police regulation. . . . . My opinion, therefore, does not rest so much upon the particular law of Pennsylvania as upon the inherent and sovereign power of a state to protect its jurisdiction and the peace of its citizens in any and every mode which its discretion shall dictate and which shall not conflict with a defined power of the federal government."

These men were apparently disputing about a name. They were all agreeing that there were some things a state might do in reference to runaway slaves. It was quite clear that Congress was authorized to take action in reference to the whole subject of fugitive

[1] *16 Pet.*, 666. [2] *Id.*, 669.

slaves and their rendition. Should this right of the state to act in reference to the fugitive slaves within its border, in virtue of its general authority to deal with subjects of government within its jurisdiction, be referred to a "police power" or should it be called something else and said to be concurrent with the power of Congress? Whenever they approached this "police power" they evidently found it something quite undefined and undefinable, and as evidently regarded it, when attempting to consider it by itself, as being identical with Madison's "residuary sovereignty" or Marshall's "immense mass of legislation" left to the state and not touched by the federal constitution. This had at length come to be popularly designated as the police power, and the court had adopted this name of its own suggesting.

It needs no reading between the lines to see that the real antagonism was something deeper. The term police power was almost as much a federalist and a northern expression as state sovereignty was anti-federalist and southern. This debate had the same cause as had the convention of 1787. The cause of the adoption of the federal constitution, as well as of the reaching of the "unanimous" conclusion in Prigg's case, was the too well-grounded apprehension of bloody collision between contending sections. Webster's spectre of States "discordant, dissevered, belligerent" was raised as soon as the first steps toward the confederation of the colonies were taken. It would not down at Webster's voice. Neither statesman nor judge could exorcise it.

It almost provokes a smile to read Sir Henry Maine's suggestion that it is wrong to charge the federal government with failure to furnish a peaceful solution of the slavery question, that its principles were never applied to the task, and that its framers wrongly shrunk from attempting what there is reason to suppose the machine they devised might have accomplished if set to the work. Is it not honor enough to have been alone among the nations in devising a central government solely out of the fear of disunion and without the welding influence of outer pressure? Where would have been the Union that in 1787, or even fifty years later, had dared to offer a solution of the slavery problem along the lines of the Declaration of Independence? The police power under that name comes into and takes its place in our jurisprudence as one of the judicial expedients not to lay but to pacify this disturbing spirit of slavery.

The fact that most of the discussions involving the police power

are in cases relating to the commerce clause, and that the case in which the phrase originated—Brown *vs.* Maryland—is such a one, does not prevent this being true. The slave power was not fond of the courts. The case of Prigg *vs.* Pennsylvania was, as Judge Story remarks, the first in which the provisions of the constitution as to fugitives from slavery was involved. The exclusion laws that Winthrop was attacking the next year in his *Report No. 80*, before referred to, seldom or never reached courts of last resort. This case of Prigg *vs.* Pennsylvania, itself, was doubtless brought by one who was anything but friendly to African slavery and is by Judge McLean declared to be an agreed case.

In the well-known[1] Lemon case in New York the writ of Habeas Corpus was served in 1852, the case reached its final hearing in the Court of Appeals only in 1860. It is not surprising that litigants should not be eager to take into the last asylums of justice cases involving the relative rights of slave and owner. The comments of[2] Judge Ruffin in reversing the judgment of conviction for assault on a slave by a temporary master who had hired her from her owner, show how loath the courts were to take up the subject. The fact that no appearance of attorney was made on behalf of the victorious defendant shows, perhaps, how little inclination there was to debate in courts of law this institution which rests upon pure force applied by one man for his own profit directly upon another.

The fact that in the United States courts the questions raised are concerning commerce or taxation does not prevent their discussion being always in the presence of this sometimes smouldering, sometimes blazing brand of dissension between the states, and both argument and decision were with an eye to the consequences in that direction. The effect of slavery in thus bringing into prominence the doctrine of the police power, growing out of the relations of the state and federal governments, seems a remarkable example of the truth of[3] Stein's remark, that developments in constitutional and administrative law may be looked for precisely when some special interest is seeking to arrogate to itself the position of being the general public interest.

[1] Lemon *vs.* People, 20 N. Y., 562.

[2] State *vs.* Mann, *2d Dev.*, 263.

[3] *Handbuch Verwaltungs Lehre*, S. 120.

CHAPTER II.

The License Cases.

We have seen the police power so named by Chief Justice Marshall under the suggestion of Taney's argument in Brown *vs.* Maryland, as a result of the perception by the chief justice of the truth that in spite of all constitutional limitations from the side of the central government there must remain in the states an indefinite fund of legislative and governmental power to provide for the countless actual and conceivable emergencies of local government. We have seen this name, rather suggested than adopted by him, wait for ten years and until after his death to become the current one for this idea. In the same time it had become the term, not yet quite exclusively used, for the same idea in the court where it originated; that its currency was due to its getting involved in the slavery discussions, then just at an acute stage because of the growth of the southwest and the question of Texan annexation, seems to admit of no doubt.

The origination and character of this development of our law becomes still plainer with its next important appearance in the Supreme Court of the United States. This was in the[1] license cases in 1846. Once more, as in Prigg *vs.* Pennsylvania, we have a judicial debate. The judges all concurred in the disposition of all the cases. None, however, was willing to accept any of the others' reasons for doing so, except Justice Nelson, who contents himself with simply concurring with the chief justice.

The cases were simply that Massachusetts and Rhode Island had enacted statutes requiring a license from the town selectmen to authorize any retail sale of spirits in less quantities than a certain number of gallons, more, however, than the fifteen gallons which was the minimum quantity authorized by Congress to be imported at one time. New Hampshire had passed a similar act prescribing a similar condition for a sale in any quantity whatever. Each of

[1] *5 How.*, 504.

the three states required a moderate payment for such license. A case of conviction for violation of these laws was brought up from each of the states under a finding in each case that the liquors were of foreign importation and that the sellers had no license to dispose of them. It was not claimed in any of the cases that the seller was also the importer, but the right to sell the imported liquor without license was claimed. It was also asserted that the laws were an infringement on the power of Congress to regulate commerce under the constitution.

The difficulty of fixing practical rights in a court which feels more strongly than anything else that its mission is to settle the relation of discordant states by determining their mutual relation to a paramount federal state is in this case exemplified. Truly, the foreign observer is not wholly unjustified in his amazement at the deliberate creation, as he thinks it was, of such a paradise for lawyers. The judges are as satisfied in these cases that the state statutes under consideration are good as they were in Prigg *vs.* Pennsylvania that the law was bad. They are all convinced that the laws they are considering here are each a valid exercise of the police power. The question profoundly discussed, and left as far as ever from settlement, is, whether they are also a regulation of foreign commerce, and whether the state has any concurrent authority with Congress over the latter subject. The increasing vogue of the term "police power" is noticeable. It is true that Chief Justice Taney does not yet quite fully adopt it, even in attempting to define, or rather describe, its meaning. After saying that no one controverts that the constitution, and laws made pursuant to it, are the supreme law of the land, and that consequently the acts of Congress must prevail in the domain of interstate and foreign commerce, he adds:

"But this power extends no further than such domain and beyond this the power of the state is supreme."

This, he says, is unquestioned, but the "trouble lies in the application of it"—not an uncommon trouble in deciding cases, but in this one the difficulty was not so much in making the application as in getting the nine judges to agree as to what it was they were applying. A discussion seldom settles questions. Courts settle them by deciding them. By discussing them they usually raise some new ones.

The discussion, however, was worth all the litigation which it has and may cost as the refining on this subject still goes on. The chief justice was certainly trying to follow[1] Machiavelli's maxim, and

"pursue the real truth of things and not some mere imaginary theory or conception of them."

He gives his own matured conclusion as to the case of Brown *vs.* Maryland and its doctrines. Eulogies and compliments to Chief Justice Marshall have certainly not been wanting. Taney's declaration here that he had concluded that he was wrong in his contention in that case and that Marshall was right is of them all perhaps the greatest and most touching. It has been said that the greatest victory of a disputant is not to silence but to convince his adversary.

But Taney has no difficulty in holding that in the cases of Massachusetts and Rhode Island the laws acting only on the retail trade are out of the sphere of interstate and foreign commerce. In the New Hampshire case, however, he admitted that, as the law required a license from the state before making any sale in any quantity whatever, it acted directly upon foreign commerce, and was void if the state had no power over such commerce. He, however, insists upon a subordinate power in a state to legislate upon that subject so long as it does not go contrary to the legislation of Congress nor get outside of the proper functions of local government.

That the term "police power" was not fully to the mind of the chief justice appears when he comes to discuss that subject and the distinction which he seeks to formulate between true police laws, over which he says Congress has no control, and this subordinate power of legislation which Congress can annul. Speaking of the case of Gibbon *vs.* Ogden, he says:

[2] "Moreover, the court on pages 205, 206 distinctly admits that a state may in the execution of its police and health laws make regulations of commerce, but which Congress may control. It is very clear that so far as these regulations are merely internal, and do not operate on foreign commerce or commerce among the states, they are altogether independent of the power of the general government and cannot be controlled by it."

That they are subject to control by Congress, therefore, stamps them as regulations of commerce in his eyes.

[1] *The Prince*, Chap. 15.

[2] *5 How.*, 582.

Then he asks:

[1] "What are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominion, and whether a state passes a quarantine law or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power: that is to say, this power of sovereignty, the power to govern men and things within the limits of its own dominions. It is by virtue of this power that it legislates, and its authority to make regulations of commerce is as absolute as its power to pass health laws, excepting so far as it has been restricted by the constitution of the United States. When the validity of a state law is drawn in question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the legislature, nor can the court inquire whether it was intended to guard the citizens of a state from pestilence and disease or to make regulations of commerce for the interests and convenience of trade."

He cites a number of other matters in which the states legislate notwithstanding Congress has authority, as in matters relating to the militia, the bridging of navigable streams, as illustrated in [2] Houston *vs.* Moore and [3] Wilson *vs.* Blackbird Creek Marsh Company. He holds the New Hampshire law and judgment valid, though the gin sold was brought from another state in the same barrel and Congress had undoubted power to regulate such traffic. Congress, however, had not done so, and therefore he thought the state, in the exercise of its general governmental powers, might deal with it as it pleased and either license or prohibit altogether such sales.

Judge McLean is, even more thoroughly than the chief justice, of the opinion that the laws and judgments in question are valid. He does not, however, like him, admit there is any neutral or common ground between the powers of the state and those of the federal government; each, to his mind, is absolutely supreme in its own sphere. So he thinks there can be no question that these are public laws, and therefore are not regulations of commerce.

[4] "The states resting on their original basis of sovereignty, subject only to the exceptions stated, exercise their powers over everything connected

[1] *5 How.*, 583.
[2] *5 Wheat.*, 1.
[3] *2 Pet.*, 245.
[4] *5 How.*, 588.

with their social and internal condition; a state regulates its domestic commerce, contracts, the transmission of estate, real and personal, and acts upon all internal matters which relate to its moral and political welfare.

"Over these subjects the federal government has no power. They appertain to the state sovereignty as exclusively as powers exclusively delegated appertain to the general government." . . . . "A license to sell an article, foreign or domestic, as a merchant, an innkeeper or a victualer, is a matter of police and of revenue within the power of a state." . . . . "The acknowledged police power of a state extends often to the destruction of property. A nuisance may be abated, everything prejudicial to the health or morals of a city may be removed. Merchandise from a port where a contagious disease prevails, being liable to communicate the disease, may be excluded. In extreme cases it may be thrown into the sea. This comes into direct conflict with the regulation of commerce, and yet no one doubts the power. It is a power essential to self-preservation, and exists necessarily in every organized community. It is indeed the law of nature and possessed by man in his individual capacity."

Judge Taney's old gunpowder argument and illustration in Brown *vs.* Maryland come back again. After concluding that the case in hand is not one of sale by the importer, and therefore the precedent in Brown *vs.* Maryland did not apply, he answers the argument that a power such as he has described might be used to interfere with foreign and interstate commerce merely by saying that the fact that a power may be abused furnishes no inference of its non-existence. What power may not be abused in human hands?

Coming back again to the relations of the police power to that of Congress, he says that they must stand together:

"Neither of them can be so exercised as to materially affect the other. The sources and objects of these powers are exclusive, distinct and independent, and are essential to both governments. The one operates upon foreign commerce and the other upon the internal concerns of a state; the former ceases when the foreign product becomes commingled with the other property in the state. At this point the local law attaches and regulates it as it does other property. The state cannot, with a view to encourage its local manufactures, prohibit the use of foreign articles, or impose such a regulation as shall be in effect a prohibition. But it may tax such, as it taxes other and similar articles in the state, either specifically or in the form of a license to sell. A license may be required to sell foreign articles when those of a domestic

manufacture are sold without one, and if the foreign article be injurious to the health or morals of the community, the state may, in the exercise of that great and conservative police power which lies at the foundation of its prosperity, prohibit the sale of it. No one doubts this in regard to infected goods or licentious publications."

This seems to be carrying the doctrine of faculties even farther in the theory of government than it was ever carried in metaphysics. He adds as a corrective:

"Such a regulation must be made in good faith and have for its sole object the preservation of the health or morals of society. If a foreign spirit should be imported containing deleterious ingredients fatal to the health of those who use it, its sale may be prohibited. When in the appropriate exercise of these federal and state powers contingently and incidentally their lines of action run into each other, if the state power be necessary to the preservation of the moral health or safety of the community it must be maintained; but this exigency is not to be founded on any notions of commercial policy or sustained by a course of reasoning about that which is supposed to affect in some degree the public welfare."

With regard to the New Hampshire case, he holds the fact that all sales whatever without license are forbidden does not vitiate the law, because, as he thinks, the prohibition of tax upon imports by the states has reference only to imports from foreign countries.

Justice Catron comes to the support of the chief justice, and thinks the giving Congress power to legislate on a given subject would not of itself deprive the states of such power, but only of all right to act contrary to the constitution or to acts of Congress passed in accordance with it. The assumption is that the police power was not touched by the constitution, but left to the states as the constitution found it. This is admitted; and whenever a thing from character or condition is of a description to be regulated by that power in a state, then the regulation may be made by the state, and Congress cannot interfere; but this must always depend on facts subject to legal ascertainment, so that the injured may have redress, and the fact must find its support in this: Whether the prohibited article belongs to and is a subject to be regulated as a part of foreign commerce or commerce among the states. If from its nature it does not belong to commerce, or if its condition from putrescence or other cause is such when it is about to enter the state that it no longer belongs to com-

merce—or, in other words, is not a commercial article—then the state power may exclude its introduction. As an incident to this power, the state may use means to ascertain the fact, and here is the limit between the sovereign power of the state and federal power.

"What, then, is the assumption of the state court? Undoubtedly in effect that the state had power to declare what should be an article of lawful commerce in the state, and having declared that ardent spirits and wines were deleterious to morals and health, they ceased to be commercial commodities there, and that then the police power attached and consequently the powers of Congress could not interfere. The exclusive state power is made to rest not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the state laws and asserted as a state policy that it shall be excluded from commerce. By this means the sovereign jurisdiction in the state is attempted to be created where it did not before exist."

As Judge Catron adds, if the state can do this at pleasure, the power of Congress over commerce is gone. For that reason he thought the New Hampshire case could not be held to depend upon the police power, considered as a sovereign reserve power in the state and beyond all control of Congress. If the law is to be sustained, it must be held to have passed in the exercise of a subordinate power over commerce not forbidden to the states either impliedly by the constitution nor expressly by Congressional legislation. He then follows over the ground occupied by the chief justice, [1] citing [2] Hamilton in *The Federalist.*

Judge Daniel attacks the doctrine of Brown *vs.* Maryland as energetically as the chief justice upholds it. Judge Daniel declines to allow that the commercial power of Congress extends into the states and accompanies imported articles to their destinations within state boundaries. He declares,

[3] "It is wholly otherwise under our system of confederated sovereigns."

Justice Woodbury finds the cases satisfactorily disposed of in the opinions already given, and the most of the points raised he thought not material. He, however, like Justice Daniel, is unable to "put his conscience into commission" where the relations of the state are concerned.

[1] *5 How.*, 607. [2] *Federalist*, No. 32. [3] *5 How.*, 615.

[1] "But looking to the relations which exist between the general government and the different state sovereignties, the question whether the laws in these cases are within the power of the states to pass without an encroachment on the authority of the general government is one of those conflicts of laws between the two governments, involving the true extent of the powers in each, which is very properly placed under our revision."

Agreeing with Chief Justice Taney and Justice Catron that the states have some powers of legislation over interstate commerce, he, nevertheless, is unable to find these license laws, even in the case of New Hampshire, prohibiting as it did absolutely sales without license, to be regulations of commerce. As he truly enough says, for more than half a century such license laws had been universally in use among the states, and no one had thought of regarding them as regulations of foreign commerce. The fact that they might have some effect on commerce could not be allowed to vitiate them if in fact they were properly directed at and had their principal effect upon something else and that something was within the state jurisdiction. He strikes the burning question really underlying all this when he discusses the principles as applicable to the exclusion of persons as well as things, and where he refers again to [2] Prigg *vs.* Pennsylvania, the police power and runaway slaves.

Judge Grier also concurs in the judgments but agrees with Justice McLean as to the exclusive nature of the power of Congress over commerce, though he does not consider that point involved. He finds in the "complete, unqualified and exclusive" power of "internal police" developed by Justice Barbour in the case of New York City *vs.* Miln and in the maxim "*Salus populi, Suprema lex est*" a sufficient warrant for all three of the laws under consideration:

"The police power which is exclusively in the state is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority."

His conclusion is that the evils of pauperism and crime which have their origin in the traffic in ardent spirits are ample warrant for the placing them under the jurisdiction of this authority.

[1] 5 *How.*, 618. [2] *Id.*, 628-9.

It is to be said, again, that these men were not debating about mere words. In the condition things then were, it mattered greatly whether various questions as to which the states were constantly legislating, and were certain to continue doing so, should be referred to a subordinate power subject to the revision of Congress, or to a police power which was "complete, unqualified and exclusive." In setting up a neutral ground, in holding that the states might continue to legislate in regard to a subject over which Congress was, by the terms of the Constitution, simply given power of regulation, Chief Justice Taney was not simply following separatist tendencies. He was, as he firmly believed, carrying out not only the intentions of the framers of the constitution,[1] who seem to have rejected a proposition in the convention to make this power in terms exclusive, but Marshall's judicial opinion as well.

It is true that Story, who based his dissent in the City of New York *vs.* Miln mainly on such exclusive power of Congress, says he has the consolation of knowing that in this position he had the concurrence of the late chief justice "upon the same grounds." But Judge Story weakens his own statement when he adds:

"Having heard the former agument his deliberate opinion was that the present case fell directly within the principles established in the case of Gibbon *vs.* Ogden, *9th Wheaton*, 1, and Brown *vs.* State of Maryland, *12th Wheaton*, 419."

It is to be noted that Judge Story had also taken the position that the New York law in the case of City of New York *vs.* Miln was at variance with Congressional legislation; and it is as to this position that in his dissenting opinion he cites both these cases most successfully. He hardly ventures to claim them as supporting an exclusive power in Congress.

It is clear that to claim the judge who in Gibbon *vs.* Ogden, while acknowleding the force of the argument for exclusive power in Congress over this subject pointedly declined to hold that such was the case, and who, in [2]Wilson *vs.* Blackbird Creek Marsh Company, upheld a state law relating to bridging a navigable creek distinctly on the ground of a power remaining in the states, where no act of Congress intervened, to pass legislation affecting commerce

[1] *3d Elliot's Debates*, 259.

[2] *2 Pet.*, 251–2.

and navigation, as the author of the doctrine of such exclusive power on the part of Congress is, as Taney remarks,

"To make different parts of that opinion (Gibbon *vs.* Ogden) inconsistent with each other, an error which I am quite sure no one will ever impute to the eminent jurist by whom the opinion was delivered."

A lifetime of struggle with Marshall's logic had made Taney, at least, as able to get his meaning where his conclusions were accepted and sympathized with as was Story. Taney's derivation of consequences would be the closer of the two. That he regarded himself as strictly following Marshall's lead given in Wilson *vs.* Blackbird Creek Marsh Company, and the latter as in no degree inconsistent with, but on the contrary derivable from the doctrine of Gibbon *vs.* Ogden and Brown *vs.* Maryland, is clear. That Marshall should, after recognizing so clearly in his opinion in Gibbon *vs.* Ogden the exclusive right of the state to regulate its "internal police," have shown as he did[1] that he considered the validity of much legislation which had been enacted by the states to depend upon its conformity to that of Congress, would seem to establish that at that time, as well as in 1829 when he decided the case of Wilson *vs.* Blackbird Creek Marsh Company, he recognized such a subordinate power in the states. With Taney, many will prefer to doubt the posthumous assertion of his adherence to the doctrine of exclusive power in Congress, rather than question his consistency.

This view will commend itself the more because Taney's doctrine was anything but separatist in practical tendency, and offered far greater opening, in fact, for the adjustment of differences between the states and the federal government than did the other. If the only authority on the part of states to legislate comes from a sovereign police power, "complete, unqualified and absolute," every enactment must be an assertion of such power and every inconsistency with federal legislation a clash of sovereigns. Then, too, if they were, as Story, McLean and Grier insisted, wholly separate fields, one belonging to the federal and the other to the state governments, the one fenced off to its owner by the constitutional grant of power to regulate commerce, and the other to the states by the constitutional reservation of all powers not conferred, neither Congress on the one hand nor the state legislatures or con-

[1] See p. 364.

stitutions on the other could enlarge or diminish their respective holdings. According to this a hard and fast line had been drawn over which neither could step, either for good or for evil.

The practical consequences of such a dispute in the court at a time when the differences between the sections were rapidly drawing to a crisis may be easily seen. That Taney's is the more practical and statesmanlike view seems clear; that it is supported by a closer following of historical development seems also true. It was not, however, sufficiently in accordance with the desire for sharp distinctions, the effort to hold the states and the national government clearly apart, which characterized both popular and professional sentiment at that time. The followers of the prevalent modern doctrine of the exclusive power of Congress over interstate and foreign commerce and of an entirely separate domain of police power may style themselves and [1] be styled the school of Marshall, but they can prove their position by their master only on the authority of Judge Story in a dissenting opinion written after the great chief justice was no more.

To appreciate the importance attached to every shred of power by the adherents of state and national authority respectively, the steadily growing slavery discussion and sectional bitterness must be kept in mind. The license cases are almost precisely contemporary with the Wilmot proviso, and the mission of Mr. Samuel Hoar to South Carolina as agent of the commonwealth of Massachusetts to look after the interests of colored seamen, her citizens, seized from their vessels in Charleston harbor. He left the city on the advice of the city and state authorities that he was not safe, and they could not and would not protect him.

[1] *Harvard Law Review*, Vol. xii, 359.

CHAPTER III.

THE POLICE POWER AND THE "COMMERCIAL POWER" OF CONGRESS COLLIDE IN THE "PASSENGER CASES."

Two years later in the [1]Passenger cases the police power and the commerce clause of the federal constitution appeared again in conflict in the United States Supreme Court. This was a signal for a renewal upon a still larger scale of the judicial debate over the relations of these two subjects. It gradually appeared that Chief Justice Taney and Justice McLean were the protagonists for the respective sides, if sides there were, where each judge repudiated more or less of the reasons for his position given by those who agreed with him. These cases, originating in 1841 and decided in 1848, were in some degree a triumph of the commerce clause in the constitution and of the doctrine of exclusive power in Congress over that subject and a recession from the assertion of a "complete, unqualified and absolute" police power in the states as declared in the City of New York *vs.* Miln. The discussion was even longer than in the License cases. The latter had occupied one hundred and twenty-nine pages in *5th Howard's Reports.* The Passenger cases filled two hundred and sixty-nine pages in *7th Howard.*

By a law of the state of New York the health commissioners of the city of that name were authorized to collect and receive, and in case of failure to pay to sue for and recover of the master of every ship arriving in its harbor $1.50 for each cabin passenger and $1.00 for each steerage passenger and mariner, and from each coasting vessel twenty-five cents for each person on board. Coasting vessels from New York, Connecticut and Rhode Island were only to pay once a month. Such money was to be denominated "Hospital Moneys," and the master was authorized to collect it from his passengers and crew. A failure for twenty-four hours after arrival on the part of the master to make such payment subjected him to a penalty of one hundred dollars. The health commissioners were to account annually to the state comptroller for all

[1] 7 *How.*, 283.

money so received, and if this was more than sufficient for the necessary maintenance of the marine hospital, including their own salaries and certain payments to the city, they were to pay the surplus to the treasurer of the Society for the Reformation of Juvenile Delinquents.

Suit was brought to recover this penalty and for the required payment against the master of the English ship *Henry Bliss* for landing two hundred and ninety passengers. Judgment was rendered against him in the trial court, and also on appeal in the state court of last resort, and the case then taken to the Supreme Court of the United States.

In 1837 it had been enacted by the legislature of the state of Massachusetts that each vessel coming into harbor at Boston be boarded by officers appointed by the city authorities and no lunatic, idiot, maimed, aged or infirm person, incompetent, in such boarding officers' opinion, to earn a livelihood, and no person who had been a pauper in any other country found on such vessel be permitted to land, unless bond in the sum of one thousand dollars should be given that such person would not become a public charge within ten years; and that no passenger be permitted to land from such vessel till two dollars for each passenger so landing had been paid to such boarding officer.

A Nova Scotia schooner called *The Union Jack* had landed nineteen passengers at Boston. Her master had paid the fee under protest and brought an action to recover it back, and from judgment against him in the state courts had taken the case by error to the United States Supreme Court.

The court, in an opinion by Justice McLean, with whom concurred Justices Wayne, Catron, McKinley and Grier, decided the laws both bad as being infringements upon the power of Congress to regulate foreign and interstate commerce.

He considers the question under two general heads: first, Is the power of Congress to regulate commerce exclusive? and, second, Is the statute of the state of New York, and subsequently the Massachusetts statute, a regulation of commerce? In discussing the first, he has discovered that the doctrine that the legislative power of the state can be in any case subordinate

[1] "degrades the states by making their legislation to the extent stated

[1] 7 *Howard*, 399.

subject to the will of Congress. . . . . State powers are at all times and under all circumstances exercised independently of the general government and are never declared void or inoperative except when they transcend state jurisdiction, and, on the same principle, the federal authority is void when exercised beyond its constitutional limits."

Of course, by dwelling upon this he only adds force to Taney's remark in the License cases that it is inconsistent to make the fields of state and federal legislation mutually exclusive and still make the validity of state legislation depend in any degree upon its conformity to that of Congress; and this inconsistency must be attributed to [1]Chief Justice Marshall if it is claimed that he held the power of Congress to be exclusive. He had in Gibbons *vs.* Ogden and Wilson *vs.* Blackbird Creek Marsh Co. held the state legislation considered in those two cases bad and good respectively, according as it agreed or not with that of Congress. If the position of Story, and after him McLean, is sound, it is not a question of consistency with Congressional enactments or otherwise, but is simply one of power or absence of it on the part of the state.

The argument of Justice McLean, otherwise, goes over the familiar ground and cases, but he spends more effort in trying to show the essential repugnancy of two concurrent powers over the same subject in the same state, and hence he thinks that commerce and police powers must be held to be two different and distinct things. He says:

"No one has yet drawn the line clearly because, perhaps, no one can draw it between the commercial power of the Union and the municipal power of a state. Numerous cases have arisen involving these powers which have been decided, but a rule has necessarily been observed as applicable to each case and so must every case be adjudged."

He finds that the laws in question impose a tax on commerce which Congress by non-action had decided should be free. Out of a [2]remark in the opinion in City of New York *vs.* Miln, that persons were not subjects of commerce and so putting restrictions on bringing them in was not taxing imports, it had been sought to develop a doctrine that the transportation of passengers was not commerce, and so Congress had no authority over it. Over this question the judicial debate went on at a length there is no occasion now to

[1] See page 364.

[2] *11 Pet.*, 136.

follow. Toward the end of his opinion Justice McLean touches again upon the police power, this time in its relation to taxation :

[1] "The police power of the state cannot draw within its jurisdiction objects which lie beyond it. It meets the commercial power of the Union in dealing with subjects under the protection of that power, yet it can only be exerted under peculiar emergencies and to a limited extent. In guarding the safety, health and morals of its citizens a state is restricted to appropriate and constitutional means. If extraordinary expenses be incurred an equitable claim to an indemnity can give no power to a state to tax objects not subject to its jurisdiction."

Justice Wayne, who took no part in the discussion of the License cases but concurred in the decision, now declares himself for the doctrine of exclusive power in Congress over commerce, and says that opinions to the contrary are "individual opinions," and without authority "to overrule the contrary conclusion as it is given by this court in Gibbon *vs.* Ogden." He does not think it necessary to reaffirm that doctrine, however, in these cases.

He announces nine conclusions of the court in these Passenger cases, with most of which the police power has little direct concern. The second of them is, that the states cannot tax commerce of the United States to help defray expense of executing police laws, and that commerce includes intercourse of persons as well as importations of merchandise. He also finds the laws in question are inconsistent with certain treaties and Congressional enactments, though why he should do so, after concluding that their entire subject is outside of the domain of state legislation, is not quite clear. His ninth conclusion is that the states may, in the exercise of their police powers, establish quarantine and health laws and impose penalties for their violation ; that such laws though affecting commerce do not regulate it, and in the exercise of such police power without infringing on that of Congress the state may exact from owners and passengers of vessels the costs of their detention and purification. The laws under consideration are held to be not of this character but to establish a tax in each case on foreign commerce and, therefore, void.

Coming to discuss the claim that they are merely police laws and the charges merely to cover the expense of executing them, he says :

" A proper understanding of the police power of a nation will probably

[1] 7 *How.*, 408.

remove the objection from the minds of those who made it. What is the supreme police power of the state? It is one of the means used by sovereignty to accomplish that great object, the good of the state. It is either national or municipal, in the confined application of that word to corporations and cities. It was used in the argument invariably in its national sense. In that sense it comprehends the restraint which nations may put upon the liberty of entry and passage of persons into different countries for the purposes of visitation or commerce."

"Police powers, then, and sovereign powers are the same. The former being considered as so many particular rights under that name or word collectively placed in the hands of the sovereign." . . . . "How much of it have the states retained? I answer unhesitatingly, all necessary to their internal government. Generally, all not delegated by them in the articles of confederation to the United States of America; all not yielded by them under the constitution of the United States. Among them, qualified rights to protect their inhabitants by quarantine from the fields. Imperfect and qualified, because the commercial power which Congress has is necessarily connected with quarantine, and commerce may by adoption, presently and for the future, provide for the observance of such state laws making such alterations as the interest and conveniences of commerce and navigation may require. Such has been the interpretation of the right of states to quarantine and that of Congress over it from the beginning of the federal government. Under it the states and the United States, both having measurably concurrent rights of legislation in the matter, have reposed quietly and without any harm to either until the acts now in question caused this controversy." [1]

This is what resulted to Judge Wayne from accepting [2] "just as it is expressed" Story's and McLean's laboriously constructed doctrine of totally distinct domains for state and federal power. He goes on to remark that the whole trouble has arisen out of the claim of a right to remove and keep out of the state dangerous persons. He finds the power to regulate commerce, also, one of those particular rights collectively placed in the hands of the sovereign for the good of the state.

The bearing of these cases upon the burning controversies of the time comes out in the following:

[3] "The fear expressed that if the states have not the discretion to determine who may come and live in them, the United States may introduce into the southern states emancipated negroes from the West Indies and

[1] *How.*, 424. [2] *Id.*, 411. [3] *Id.*, 428.

elsewhere, has no foundation. It is not an allowable inference from the denial of that position or from the assertion of the reverse of it."

The long account of how the opinion in the case of City of New York *vs.* Miln came to be given, and especially to contain the remark that persons are not subjects of commerce, has no relation to the police power except as showing how almost by accident an opinion so important in the history of that power and in popularizing the use of the term came to be adopted and published as the opinion of the court.

Justice Catron does not discuss the question of the concurrent but subordinate power in the states to regulate commerce which he upheld in the License cases. He finds that these laws now in question provided a tax on foreign commerce, which is contrary to the national policy and legislation, and, therefore, that they are void.

[1] "Were this court once to hold that aliens belonging to foreign commerce and passengers coming from other states could have a poll tax levied on them on entering any port of the state, on the assumption that the tax could be applied to maintain state police powers, and by this means the state treasury could be filled, the time is not distant when states holding the great inlets of commerce might raise all necessary revenues from foreign intercourse and from intercourse among the states and thereby exempt their own inhabitants from taxation altogether."

He finds the passengers in these cases were not subjects of any police power or sanitary regulations, and thus frankly rests his conclusions on general expediencies, and is noticeably cautious of approaching the abstract question as to the exclusiveness or otherwise of the federal power over commerce.

[2] Justice McKinley deals only with clause 1 of article 9 of the federal constitution as to the exclusion of persons, and thinks it does not refer simply to the slave trade, but puts the whole question of immigrants and their regulation into the hands of Congress.

Justice Grier follows substantially the ideas of Justice Catron, that twelve states in the Union had no seaport, that the constitution was adopted principally to avoid commercial disagreements and troubles between the states; and he leaves practically out of view both the claim of police jurisdiction for the state and that of exclusive power on the part of Congress.

[1] 7 *How.*, 448. [2] *Id.*, 452.

Of the five judges of the majority, McLean and Wayne assert the supremacy and exclusiveness of the power of Congress over interstate and foreign commerce, and the same supremacy and exclusiveness in the police power of the states, though with some faltering in the latter on the part of Justice Wayne. The other three decline to discuss the exclusiveness of Congressional power, but all five find in the laws a tax on passengers which no state has authority to exact, and for which the police power in any view furnishes no justification.

Justice McLean, especially, builds two sovereignties and assigns to one under the name of the commercial power the absolute disposition of all foreign and interstate commerce without so much as even a suggestion from the other, and to that other under the name of police power a like absolute control of domestic commerce and general local government. He admits that no clear dividing line exists between the two, that on each side the one is constantly passing into each other, but trusts to the resources of his court to reconcile them when they clash. It is not much wonder that Chief Justice Taney, and Justices Daniel, Nelson and Woodbury with him, were disturbed by the prospect of such a task, at a time when the churches of the country were splitting it into northern and southern, and the dispute between the two sections was just reaching the crisis which was allayed by the compromise of 1850.

The chief justice declares that the question involved in these cases is, whether under the constitution the federal government has the right to compel the states to receive and permit to remain in association with their citizens every class of persons whom it may be the policy or pleasure of the United States to admit from abroad.

[1] "If the people of the several states of this Union reserved to themselves the power of expelling from their borders any person or class of persons whom they might deem dangerous to their peace or likely to produce physical or moral evil among their citizens, then any treaty or law of Congress invading this right and authorizing the introduction of any person or description of persons against the consent of the state, would be an usurpation of power which this court could neither recognize nor enforce. I had supposed this question not now open to dispute. It was distinctly decided in [2] Holmes *vs.* Jenison, [3] Groves *vs.* Slaughter and [4] Prigg *vs.* Commonwealth. If these cases are to stand the right of the state is undoubted."

[1] *7 How.*, 466. [2] *14 Pet.*, 540. [3] *15 Pet.*, 449. [4] *16 Pet.*, 539.

He, therefore, finds in a right to exclude these passengers a more than sufficient authority to prescribe the conditions on which they may come in. He cites his own opinion in the License cases as to a right in the states to legislate locally on commerce, where Congress has not done so, and cites the thirty-second paper of *The Federalist* on this point. He declines to see, in any law or treaty cited, anything contradictory to the state legislation in question, and sees in the ninth section of article 1 of the federal constitution no reference to anything but the slave trade. He [1] admits the transporting of passengers is a part of commerce, but declines to reckon passengers themselves as imports. He does not see that in resigning the regulation of interstate and foreign commerce to Congress the states intended to give up any power of taxation, and referring to Mayor of the City of New York *vs.* Miln, says that the state law in that case was sustained upon what was called the police power of the state.

He closes with an assertion of the rights of the federal government as strong as that of Judge Miller, given in Crandall *vs.* Nevada, in 1867 :

"For all of the great purposes for which the federal government was formed, we are one people with one common country. We are all citizens of the United States, and, as members of the same community, must have the right to pass and repass through every part of it without interruption as freely as in our own states ; and a tax imposed by a state for entering its territories or harbors is inconsistent with the rights which belong to the citizens of other states as members of the Union, and with the object which that Union was instituted to attain. Such a power in the states could produce nothing but discord and mutual irritation, and very clearly they do not possess it. But upon the question that the record brings up the judgment in the New York case, as well as that in Massachusetts, ought in my opinion to be affirmed."

The opinion of Justice Woodbury is important on two accounts, as setting forth somewhat carefully a view of the police power as such, and as suggesting that doctrine derived from *The Federalist*, that the power of Congress is exclusive in cases which admit of only a uniform rule applicable to the entire country, which became that of the court by the decision in the case of [2] Cooley *vs.* Board of Port Wardens, decided three years later, and which by the case

[1] 7 *How.*, 473. [2] 12 *How.*, 299.

of [1] Leisy *vs.* Hardin, decided in 1890, was converted into the form that the power of Congress is exclusive except in cases that do not admit of a uniform rule applicable to the entire country. Justice Woodbury defends the laws as police measures :

[2] "A police measure, in common parlance, often relates to something connected with the public morals, and in that limited view would still embrace the subject of pauperism as this court has held in *16 Peters*, 625. But in law the word police is much broader and includes all legislation for the internal policy of the state (*4 Black*, chap. xiii). The police of the ocean belongs to Congress and the admiralty powers of the general government, but not the police of the land or of harbors."

And he proceeds to argue it is only in form a tax, and is merely to obtain the expenses of policing the vessels and persons who are required to pay it.

The bearing of these cases upon the slave controversy fully appeared in this opinion on page 526 :

" It having been then, both in Europe and America, a matter of municipal regulation whether aliens shall or shall not reside in any particular state or even across its borders, it follows that if a sovereign state pleases it may, as a matter of clear right, exclude them entirely, or only when paupers or convicts, or only when slaves, or what is still more common in America, in free states as well as slave states, exclude colored immigrants though free. As further proof and illustration that this power exists in the states and has never been parted with, it was early exercised in Virginia as to other than paupers, and it is now exercised in one form or another in more than half of the states of the Union."

He concludes that the matter under consideration

[3] "is not one of those incidents to our foreign commerce which, like duties on imports or taxes or tonnage, require a universal, uniform rule to be applied by the general government. A uniform rule by Congress not being needed on this particular point nor being just is a strong proof that it was not intended Congress should exercise power over it."

" The silence of Congress, which some seem to regard as more formidable than its action, is whether in full or in part to be respected and obeyed only where its power is exclusive and the states are deprived of all authority over the matter." . . . . " In other cases, when the power of Congress is not excluded and that of the states is concurrent, the silence of Congress to legislate on any mere local or subordinate matter

[1] *135 U. S.*, 100. [2] *7 How.*, 523. [3] Page 546.

within the limits of the state, though connected in some respects with foreign commerce, is rather an invitation for the states to legislate upon it than a circumstance nullifying, destroying every useful and ameliorating provision made by them. Such, in my view, is the true rule in respect to commercial grant of power over matters not yet regulated by Congress and which are obviously local. In the case of Wilson *vs.* Blackbird Creek Marsh Company, Chief Justice Marshall not only treated this as a true rule generally, but held it applicable to the grant to Congress of the power to regulate commerce."

The police power was clearly getting at least an extensive discussion in the Supreme Court. Chief Justice Taney still refers to "what is called the police power" in New York *vs.* Miln, but the term had by this time almost entirely superseded the old circumlocutions. Whenever an attempt is made to analyze and define it, as here by McLean, Wayne and Woodbury, and in the License cases by Taney, it is still, however, invariably found to turn back into that [1] "indefinite supremacy" which Madison found involved in all ideas of government.

Possibly the judges would have done better to have recognized more fully what he says elsewhere:

[2] "That among a people consolidated into one nation, this supremacy is completely vested in one legislature. Among communities united for particular purposes it is vested partly in the general and partly in the municipal legislature."

It will be observed that Madison is very far from asserting any difference in nature between the powers exercised by the two legislatures. They are in his view simply placed in different bodies by an arbitrary division. He finds that when thus divided the national and the local governments each share in this indefinite supremacy. The writers of *The Federalist* were concerned only in showing that the power of the general government must be indefinite and succeeded in doing so. As Hamilton stated it, [3] "of the same nature" (with the laws of mathematics)

"are those other maxims in ethics and politics that there cannot be an effect without a cause; that the means ought to be proportioned to the end; that every power ought to be commensurate with its object; that there ought to be no limitation of a power destined to effect a purpose which is itself incapable of limitation."

[1] *Federalist*, No. 39, p. 238, Lodge ed.
[2] *Id.*, No. 31, p. 180.
[3] *Id.*, No. 31, p. 180.

A little farther on he says:

[1] "A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible, free from every other control but a regard to the public good and to the sense of the people. As the duties of superintending the national defense and of securing the public peace against foreign or domestic violence involve a provision for casualties and dangers to which no possible limits can be assigned, the power of making that provision ought to know no other bounds than the exigencies of the nation and the resources of the community."

No doubt. But the demands upon the means and powers of the states in executing their function of providing for the domestic peace, justice and prosperity are equally indefinite and unlimited and require a like domestic power with "no other bounds than the exigencies of the 'states' and the resources of the community." Hamilton recognized this and sought to supply such indefinite powers from what he considered their true source,[2] the national government. That was the meaning of his scheme for local federal magistrates and United States justices of the peace.

That method did not commend itself to his fellow-citizens. They preferred to believe that they had, as was supposed by the makers of it, and as he had argued at the time of its creation, a system of divided sovereignty, and that these indefinite powers were lodged in both state and federal governments. The fashion came in with the case of Mayor of New York *vs.* Miln of styling this "indefinite supremacy" supposed to be lodged in the state the "police power." This was especially true of those who wished to minimize the influence of the states while asserting it.

The federal government was generally supposed to be one of enumerated powers, but Marshall, following Hamilton, had bestowed upon it—or, if the expression is preferred, had found in it—with the consent and approval of practically all his fellow-citizens, the additional power of self-preservation. This turns out to be nothing less than Madison's "indefinite supremacy." To maintain itself it must override whatever opposed it, and the states and their authorities if they should do so.

The practical discovery of this was naturally in applying the

[1] *Federalist*, No. 31, p. 182.

[2] Hamilton's works, Vol. viii, 518; Sumner's *Hamilton*, p. 230.

commerce clause of the federal constitution. The attempt to regulate foreign commerce, and the following for that purpose of imported articles within the boundaries of the states, inevitably brought the federal government in contact with state government endeavoring to do the same thing in the exercise of their local power.

It seems clear enough that the "commerce power," as Justice Woodbury calls it, the "commercial power," as Justice McLean termed it and as it has often since been denominated in the Supreme Court, and this police power of the state are not distinguishable in their nature. It can hardly be a mysterious something in the federal government, called commercial power, which controls and regulates the sale and handling of an article that has come from Paris into an interior town of one of the states, and another equally mysterious something of a different and wholly distinguishable nature, called the police power of a state, which controls a like sale of a wholly similar article by the same individuals in the same place and to the same person when it happens to come from the next town, instead of from France. Is the difficulty of adjusting the exercise by two sovereignties of their powers in such juxtaposition likely to be increased or diminished by earnestly declaring that they are totally distinct in their nature and, if properly conceived, cannot come in conflict? The famous conundrum as to the number of legs the sheep has if you call the tail a leg may be inverted. It is just as difficult to make a tail out of a leg by calling it such as it is to reverse the process. There must, too, in the nature of things, be constant openings for conflict in the fact that the power of the general government is over the imported property as an article of commerce and the sovereignty of the state, with its duty to guard the public safety, health, morals and welfare, extends, in any possible view, to all the other things and persons that surround and deal with such imported articles. Commerce and trade arise only by reason of local things and persons assuming direct relations with such imported articles. The state in acting upon such local things and persons while they are in such commercial relations with imports must affect, and may prevent, such commerce. How, then, can such commerce be exclusively regulated by Congress? What is there which can be governed and controlled by two forces at once both independent and exclusive of each other.

So the state comes to have the right and, when an emergency arises, to be under the duty to take action that affects foreign and interstate commerce; and, on the other hand, regulations of foreign and interstate commerce which pass inside of state boundaries must always affect persons and things that are supposed to be under state control, and alter the rights of the states with respect to them.

In both the License cases and in the Passenger cases, only Chief Justice Taney and Justice Woodbury seem to have recognized that the two powers must, to a certain extent, interlace and cover the same field; that the only way to harmonize them is to find them, to a certain degree, concurrent, and leave that of Congress paramount. The other judges seem still to imagine that they may be wholly separated. Such a view seems yet to prevail.

The passage in Cooley's *Constitutional Limitations* discussing the possibility of conflict with national authority growing out of the plenary police power of the state seems to countenance such a view:

[1] "Any accurate statement of the theory upon which the police power rests will render it apparent that a proper exercise of it by the state cannot come in conflict with the provisions of the constitution of the United States. If the power extend only to a just regulation of rights with a view to the due protection and enjoyment of all, and does not deprive any of that which is justly and properly his own, it is obvious that its possession by the state and its exercise for the regulation of the property and actions of its citizens cannot well constitute an invasion of national jurisdiction, or afford a basis for an appeal to the protection of the national authorities."

This passage has remained practically unchanged in all the editions of Judge Cooley's work since its first publication in 1868.

If this means, as on its face it seems to, that the police power of the states, rightly conceived, is the same under the federal constitution that it would be without that constitution, and so no conflict is possible except under a misconception of the one or the other, then lawyers and judges, not excepting Judge Cooley, who have appealed so often to that instrument to avoid attempts to exercise that power, against which they could cite nothing but the constitution, have been strangely blind to the true theory.

If we are to [2] "follow the real truth of things rather than an

[1] Cooley's *Con. Lim.*, 5th ed., p. 708; 1st ed., 1868, p. 574.

[2] Machiavelli, *Le Prince*, Fr. Tr., chap. xv.

imaginary view of them," it would seem to be safer, with Chief Justice Taney, to make a qualified admission of "what is called the police power," and to decline to accept *in toto* the doctrine of an exclusive commercial power in Congress and of its essentially different nature from that of police power. If Judge Cooley only meant—as he probably would have claimed if pressed—that an accurate theory of the police power must include the fact that when it meets the paramount constitution of the United States it must yield, his expression does not seem a fortunate one. Conflict is certainly possible in all such meetings, and, in a true sense of the term, such a meeting of rival claimants is conflict.

It seems strange that the [1] "high-toned federalists of the bench," McLean and Wayne, should reproach the chief justice with a doctrine that

[1] "degrades the states by making their legislation to the extent stated subject to the will of congress."

The essence of the federalist position, as Marshall clearly recognized, is the concurrent and subordinate position of the states and the paramount power of the federal government.

In 1851 the famous case of [2] Cooley *vs.* Port Wardens of Philadelphia was decided, and the exaction of the pilot dues in the harbor of that city under laws of Pennsylvania was upheld as a state regulation of commerce. The police power was not invoked to sustain it. Justices Wayne and McLean were compelled to dissent from such a recognition of "commercial power" in a state.

The next year, 1852, the police power appeared once more in the federal court in [3] Moore *vs.* The People of the State of Illinois. This time a statute of the state of Illinois provided, under penalty of fine and imprisonment, that no one should harbor or secrete any person of color being a slave or servant, or in any way hinder an owner or master in retaking such. This law, unlike the Pennsylvania statute under consideration in Prigg *vs.* Pennsylvania, which made it a crime to forcibly seize a slave in the state of Pennsylvania without legal process, was held valid and

"not to act on master nor slave, neither on constitutional right nor remedy, but solely on citizens of Illinois."

[1] 7 *How.*, 399; Carson, *Hist. of Sup. Court*, quoting Story, p. 337.
[2] *12 How.*, 299.
[3] *14 How*, 17.

Justice Wayne, in giving the opinion of the court, continues:

"It is but the exercise of the power which every state is admitted to possess of defining offenses and punishing offenders. The power to make municipal regulations for the restraint and punishment of crime, for the preservation of the health and morals of her citizens and the public peace, has never been surrendered by the states, nor restrained by the constitution of the United States."

"In the exercise of this power, which has been denominated the police power, a state has a right to make it a penal offense to introduce paupers, criminals or fugitive slaves within their borders, and punish those who thwart this policy by harboring, concealing or secreting such persons."

That it may help the owner is no objection to such action by the state:

"If a state in the exercise of its legitimate powers should thus indirectly benefit the master of a fugitive, no one has a right to complain that it has thus far, at least, fulfilled a duty assumed or imposed by its compact as a member of the Union."

"That the defendant is thus subject to two punishments, one by the state and another by the nation, is not a good objection, as he is subject to two sovereignties and his act is a violation of the laws of each and therefore constitutes two offenses."

Here we have the same act of the same person punished by both state and nation with a view to vindicate the same right of a master, and are asked to religiously refrain from finding the powers exercised by the two governments similar or concurrent.

Judge McLean's dissenting opinion is to the effect that this was not an exercise of the police power, for the reason that the control of fugitive slaves is ascribed by the national constitution to Congress and so removed from the domain of police power. He seems to have found, though he does not name, a fugitive slave power.

How the different members of the federal Supreme Court, or how Judge Cooley himself, would frame such a "true theory" of the nature of police power as would put this case of Moore *vs.* Illinois within it and Prigg *vs.* Pennsylvania without it, and all with no assistance from express provisions of the constitution, is hard to conceive. A state law that forbids harboring a slave is a due exercise of the police power. A state law that forbids a master from taking his slave and removing him by force out of the commonwealth without the exhibition of some legal process is not.

And the distinction is to be sought in the nature of a power exercised in each case. Is this following "the real nature of things rather than an imaginary view of them"?

In following thus carefully, and perhaps tediously, these earlier cases in the court where the police power was first named, and the conception of it developed and discussed under that appellation, it was hoped that an exact apprehension might be reached as to just what was that conception. It is evidently, so far at least, Madison's "residuary sovereignty of the states." Evidently, too, it is not usually thought of by the court as including familiar forms of the exercise of such sovereignty, to which definite names had already attached, such as "eminent domain," "taxation," "administration of justice," etc. When analyzed by the judges, however, it is recognized to embrace them, or rather as not to be separable from them.

At the same time we find the phrase constantly used, even by judges of the Supreme Court of the United States, as if it denoted something absolutely definite and distinct, and always, if not easily, distinguishable from any other function of government. As we have seen, it is talked of by them as if furnishing one of the criteria between state and federal powers. It is clear, however, that it was rightly characterized by Marshall himself as a "mass of legislation," and that it is obtained as a residuum after taking away from the general powers of government, first, such powers as the convention of 1787 found it necessary to bestow upon the general government, and, second, such other powers ordinarily regarded as sovereign as had already acquired distinct recognition.

That such residuum is, and must remain, an indefinite "mass" seems clear if it is a remainder after carving away a part of sovereignty, and the latter is

[1] "an indefinite supremacy over all persons and things, so far as they are objects of lawful government,"

as Madison thought and Hamilton proved.

Political sovereignty must be made equal to the exigencies of the state. These are indefinite, unknown and unpredictable. To make anything adjustable to an unknown variant is certainly to make it indefinite. This is not to say that it has no limits. It may easily have, in some direction, a barrier which it cannot overleap.

[1] *Federalist*, No. 39, Lodge ed., p. 238.

It is to say, however, that in some directions its limits cannot be fixed. So much the authors of *The Federalist* seem to have been safe in saying.[1]

[1] NOTE TO CHAPTER III.—Since writing this chapter the author's attention has been directed to *Theories Modernes sur les Origines de la Famille, de la Société et de l'Etat*, by Prof. Pasada, being No. 4 of the "Bibliothèque Sociologique Internationale," and his finding this indefinite power precisely the distinguishing mark of a "state" as compared with other associations of mankind. See work cited, pp. 100–105 and Appendix.

CHAPTER IV.

The Police Power in the State Courts.

The police power has so far in these pages been followed through twenty-five years in the court where the name originated. The conservativeness of legal phraseology is illustrated by the manner in which it passed into other fora. In them, even more than in the court where it originated, it was to help to realize Hamilton's anticipations as to the [1] voluminousness of law under our institutions. Few prophecies, indeed, have been so abundantly fulfilled as this one of Hamilton's.

The eleven state constitutions adopted during the revolution, commencing with that of New Hampshire in 1776, and including that of Massachusetts, drawn mainly by John Adams and adopted in 1780, all contained bills of rights and without an exception sought to provide a judiciary as a coördinate branch of the government. Whether or not Holmes *vs.* Walton, decided in New Jersey in 1780, was the first judicial determination that judges might treat as void legislation not in harmony with the state constitution, at all events before the formation of the federal government it was currently admitted that such was the case. The existence of such a practice and its necessity in all limited constitutions are appealed to by [2] Hamilton in urging the adoption of the federal constitution. It was common enough already to excite no surprise when such a power was claimed for the federal judiciary.

That there were limitations on the power of a state legislature from the side of the individual citizens was as true as that limits were sought to be set up on the side of the federal government. The right, however, of the state courts to say when the legislature stepped outside its limitation was not established without a struggle. None of the state constitutions in express terms gave any such power. Indeed, the language used in [3] some of them

[1] *Federalist*, No. 78, Lodge ed., p. 490.

[2] *Id.*, No. 78, p. 485.

[3] *Const. Mass.*, Part 1, Art. 20. *Const. N. H.*, Part 1, Art. 29.

seems almost a prohibition on its exercise by the court. Nearly all of them provided that legislative, executive and judicial powers be kept distinct, and so late as 1825 the powerful dissenting [1]opinion of Justice Gibson in Eakin *vs.* Raub expresses his "deliberate conviction" that the intention of the state constitutions was not to give the judges any such functions and that it was intended that the people themselves in their frequent elections should be the guardians of their own constitutions against both executive and legislature. To be sure, in so doing he sanctions Paley's conception that the judiciary is a branch of the executive as against Montesquieu's idea of the necessity of its complete independence.

The doctrine of Judge Gibson probably rests on the basis of facts. It is difficult to read the constitutions of those early years without concluding that such a power in courts was not contemplated by their framers, and that it grew up as an after-thought and a necessity. The people were accustomed to having all laws interpreted by the courts. They saw no reason why the supreme law should not be so interpreted, when interpretation was needed. Without much regard to their own declarations that the complete separation of legislative, executive and judiciary were essential to free government, they had ratified the action of their courts in assuming such jurisdiction even before the federal constitution was formed.

When that constitution was made to embrace the provision that it and all laws and treaties made in pursuance of it should be the supreme law of the land, and that the judicial power of its courts should extend to all cases arising under it, they understood that they were submitting to the Federal Supreme Court the validity and conformity to the federal constitution of legislation of the states. Judge Gibson admits this, though his argument would seem to prevent such a holding as to an act of Congress. The famous case of [2]Marbury *vs.* Madison had held, however, that Congress could not pass an unconstitutional act and make it binding on the Supreme Court. Chief Justice Marshall's reasoning is equally applicable to the case of a state Supreme Court dealing with an act of its legislature. It is a perfect example of his mingling of dialectics and common sense and has never been shaken. Even Judge Gibson, twenty years after Eakin *vs.* Raub, declared he had changed his mind "from the necessity of the case."

[1] *12 S. & R.*, 330.

[2] *1 Cranch*, 137 (1803).

That the federal government, looked upon with such different feelings and intentions as it was by Federalists and by their opponents, and expressly authorized as it was to find the state laws unconstitutional, would develop a counter theory of power in the state was a foregone conclusion, especially with the construction and application of the federal constitution in the hands of Judge Marshall. The growth of a line of decisions as to state legislative powers was to be expected first here.

It was also certain that the development of the limitations upon state power from the other side, by insistence on the principles of the bills of rights, would take place. The latter might be expected to come more slowly, as it did. Toward the middle of the century it began to be suggested that the development of these limitations from both sides was going to leave to the states only an "empty shell of legislative power." We have [1]seen how in deciding the Dartmouth College case Chief Justice Marshall kept in mind the avoidance of

"unprofitable and vexatious interference with the internal concerns of a state" and "those civil institutions which are established for purposes of internal government, and which to subserve those purposes ought to vary with varying circumstances."

His successor in dealing with the case of Charles River Bridge *vs.* Warren Bridge, in holding that no exclusive franchise would be conferred except by express terms, expressed the determination not to take from the States

"any portion of that power over their own internal police and improvement which is so necessary to their well-being and prosperity."

In the courts generally there was little disposition to cut down too closely the powers of government.

It is not strange that the application of the bills of rights as a test of the validity of state legislation was somewhat slow. There was against it all the immense weight of legal precedent. In considering the effect which any particular institution or constitutional provision has produced in this country, it is necessary to take into consideration the solid background of English common law, or what was accepted for it and reverenced accordingly.

At the beginning of this consideration of the police power what was deemed an oversight on the part of Sir Henry Maine in not

[1] *Supra*, p. 627.

recognizing the paramount importance of the states in the American political situation of 1787 was indicated. His entire accuracy in describing the colonists as Englishmen isolated by the Atlantic and penetrated through and through with English institutions and English habits of thought, especially in matters of government and authority, must be conceded. Indeed, the common law of England plus the state organizations may be fairly stated to have been the political stock in trade of North America in 1787.

It was natural that they should idealize that common law. Blackstone had recently set forth its main outlines in those *Commentaries* which still remain the only authoritative legal treatise in our language which is also literature. His work was more popular and more read in America than in England, and is said to have found actually more purchasers before 1800 on this side of the Atlantic than on the other.

The terms in which the common law is referred to by judges and publicists of those days indicate that they regarded it as furnishing a practically complete system of civil and criminal justice. The author of the sixty-second paper of *The Federalist*, [1]whether Madison or Hamilton, seems to have dreaded innovations rather than hoped for improvements by legislation.

It needs no pointing out that this system had grown up with no conception of express constitutional limitations on the legislature. The older cases in all the state courts are based upon English precedents. These precedents never suggest any question of lack of power in the legislature, and when legislative power began to be questioned it was questioned by way of a claim that the legislature was invading rights which had been respected at least, if not established, by common law decisions and which were claimed to be under the protection of the constitutions. The newly introduced doctrines of restraint upon the legislature sought to shelter themselves behind the venerable robe of the common law. The spell that requires every crusade in Anglo-Saxon countries to be inaugurated under the guise of a vindication of ancient rights was over them also. An examination of the earlier cases commonly cited in discussions of this subject will show—like [2]Soper *vs.* Harvard College in Massachusetts in 1822, holding that an act forbidding livery-stable keepers to give credit to undergraduates of Harvard was a

[1] *Federalist*, No. 62, Lodge ed., p. 387.

[2] *1 Pick.*, 177.

valid police regulation, or the still earlier and more noticeable [1]Republica *vs.* Duquet in Pennsylvania in 1799, upholding the right of the city of Philadelphia to forbid wooden buildings in certain districts under a charter authorizing it to regulate its own police—all to be determined upon mere English precedent. It had been wont to be so, therefore it should continue to be so was the ruling. Of course there was some discussion of public policy and of the relation of the laws in question to the constitutions.

The same thing is true of the discussion of the Massachusetts license provisions, as in [2]Nightingale's case in 1831, holding a conviction good against him for selling without license, such as was required by the Boston civil authorities, produce not grown by himself. It is also true of the numerous cases in that state and elsewhere following this one, just as it was true of [3]Van Dine's case in 1828 in the same state, where a law prohibiting unlicensed persons carrying offal through the streets was held valid upon English precedents. So far as Massachusetts is concerned, it seems clear that the results in these cases are simply a victory of solid English precedents over the theories embodied in her constitution.

Her commanding position among the Northern states assured a general prevalence of such practical results among them.

In New York the same influence prevails. In 1827 the case of [4]Vanderbilt *vs.* Adams held that lawful possession of a wharf was no defense to an action for a penalty incurred by refusing to comply with an order of a harbor-master, made in pursuance of his authority from the city, that room be made at the wharf for an incoming steamer. The ownership of the wharf was not allowed to interfere with that control of the harbor which was necessary in order to maintain the standing of the port, and the combined weight of precedent, usage and public interest were held to outweigh the theoretical rights of property supposed by many to be declared in the state constitution.

In [5]Stuyvesant *vs.* Mayor in the same year the plea of ownership and of a hundred years' usage of Trinity Churchyard as a burial-place was not sufficient to avoid a conviction for interring a body there contrary to an ordinance of the city. Eloquence and learning appealed in vain to the new constitutional doctrines to aid vested

[1] *2 Yates*, 493.
[2] *11 Pick.*, 168.
[3] *6 Pick.*, 187.
[4] *7 Cow.*, 349.
[5] *Id.*, 588.

rights and the sacredness of contracts against English rulings and the manifest needs of public policy. The latter urged the sustaining of the ordinance, and sustained it was. Something more than a paper constitution is needed to turn aside an established course of public action and lead officers to surrender power whose use has become habitual and is supported by public sentiment around them. The power to so order the use of property that it should not prove pernicious to the citizens generally was so plainly necessary that no general provision of a bill of rights could take it away.

So in 1831, when in [1]Beatty *vs.* Perkins an attack was made on search warrants through the means of an action of trespass against the one who procured it, English precedents were wholly followed by the court in rejecting the new action. [2]Before this, in 1826, in the case of Brick Presbyterian Church *vs.* Mayor of New York, an express agreement by the city authorities of New York that the premises conveyed by them to the complaining church should be used as a cemetery was appealed to in vain, and the clause of the federal constitution against impairing the obligation of contracts held of no avail to bind the corporate powers of the city,

"which had been given her to use and not to sell or convey away."

The inhabited part of the city had, when the site of the cemetery was by the city conveyed to the church for the purpose, not extended so far, and the location had been sufficiently removed. With advancing population its continued use for that purpose endangered the health of the surrounding people, and an ordinance forbidding its further employment for the purpose for which it was granted was sustained.

In [3]Buffalo *vs.* Webster, in 1833, an ordinance of the city requiring all hucksters to take out license was upheld and enforced against one not an inhabitant, and in [4]Mayor *vs.* Lord, in 1837, it was determined that the city of New York was liable for property destroyed in order to stop a conflagration only to the extent provided in the statute of the state, and that the constitutional provision as to compensation did not extend to property taken in such an emergency.

So in 1836, in [5]Van Worman *vs.* Mayor, the pulling down of barns and sheds summarily as nuisances and without trial by the

[1] *6 Wend.*, 382.
[2] *5 Cow.*, 538.
[3] *10 Wend.*, 99.
[4] *18 Id.*, 126.
[5] *15 Id.*, 262.

city authorities in guarding against pestilence, was sustained as within the power granted by the legislature and as being competent for the legislature to grant. And in the same year, in [1]Meeker *vs.* Van Rensselaer, it was held that where the character of a building as being a nuisance clearly appeared, and it was plain that no remedy short of its demolition would renovate, no action would lie against a citizen for destroying it, much less against an alderman, and that no special authority for its destruction need be proved.

Whenever the legislative power was extended to new objects, where it had not in its favor the aid of long prescriptive use, more difficulty was experienced. So in [2]People *vs.* Jenkins, in 1841, a statute forbidding the running of steamers on the Hudson river at a greater rate of speed than fourteen miles an hour was strenuously assailed, but the manifest public need proved a sufficient vindication of public authority in this matter.

In Louisiana, however, as early as 1832, an [3]ordinance of the city of New Orleans providing for the summary sale of articles left on the levee without notice to the owner was held unreasonable as not being necessary for the maintenance of good order on the levee, and so an unwarrantable invasion of property rights and forbidden by the constitution. In New York, on the other hand, in the same year of 1832, the right of the city authorities of Albany[4] to destroy summarily a floating "ark" built opposite to certain piers in "The Basin" at that city which might inconvenience canal traffic was upheld almost wholly on grounds of necessity and English precedents. Constitutional arguments are merely touched upon by either court or counsel, and the case is a striking example of the force of common law precedent as against constitutional doctrine.

Indeed, the noticeable thing in all these earlier cases and the vast number of others from various parts of the country that might be cited is the comparatively slight hold that constitutional doctrines limiting the powers of legislatures have in this line of cases. It is true that they are, for the most part, merely additional examples of powers long habitually exercised; and the attitude taken toward the constitutional provisions is generally that when they were adopted these uses of power were common and are to be presumed to have been known, and if they are not interfered with in express

[1] *Wend.*, 397.
[2] *1 Hill*, 469.
[3] Laufear *vs.* Mayor, *4 La.*, 97.
[4] Hart *vs.* Albany, *9 Wend.*, 571.

terms it is also to be presumed that mere general provisions as to personal or property rights were not intended to affect them.

In all these earlier cases the legislative authority is, as before suggested, rarely attacked. The question debated and passed upon is more frequently the extent to which that authority has been, or is intended to be, exercised in the given case. And it is further to be observed that none of them use the term "police power." They talk about "Power to make police regulations," "Control of matters of internal police" and use the phrases we found in the federal cases before that of the City of New York *vs.* Miln. The first state case found in a somewhat extended examination to use the term "police power" in the court's opinion is [1]Jones *vs.* The People, in Illinois in 1852 by Judge Trumbull.

He holds that the passage of a prohibitory law to prevent all sale of ardent spirits except for medical, mechanical and sacramental purposes is "a proper exercise of the police power" and cites the License cases, *5th Howard.* The phrase police power occurs in briefs and arguments of cases in the state courts a few times prior to that, notably in those of Massachusetts and Michigan.

Judge Trumbull transfers it evidently with precisely the meaning broadly attached to it in the federal cases, as by Justice Barbour in New York *vs.* Miln, and by all the others who used it in the License and the Passenger cases—the sense in which Judge Wayne declares it was always used in the argument in the latter cases. This is its "national" as opposed to its "local" sense, the sense in which Judge Marshall first employed it. For Judge Trumbull, as for the judges from whom he took it, it means the remaining powers of the state after giving to the general government its authority and setting aside such ordinary powers as by constant use have required a separate identity and a definite name, as "taxation," "eminent domain," "administration of justice," etc.

That it was by him or by any judge up to the time now reached, 1852, confined to cases of overwhelming necessity, such as had been in England held to relieve officers from accountability for damages to individuals for which otherwise they would be liable, is clearly not true. Overwhelming necessity might conceivably call for the forbidding of sales of spirituous liquors or even for their destruction, as was held in the case of [2]Jones *vs.* Richmond in a

[1] *14 Ill.*, 196.

[2] *18 Gratt.*, 517.

suit brought for the value of liquors destroyed by city authorities, April 3, 1865, in anticipation of the entry into the city of the northern army. But the adoption of a policy of prohibition can hardly be upheld by "overwhelming necessity" or the "right of self-preservation, inherent in every organized community." Although there may be no doubt "that some have died of drinking," we are not informed of nations being in sudden and imminent peril from such cause.

"*Salus populi, Suprema lex esto*" will hardly do for a sufficient foundation for this branch of constitutional law. And the other motto which has been thought to lie at the foundation of this power, "*Sic utere tuo ut alienum non lædas*," has to be strained a good deal to make it apply here as in many other cases of police action. The object in this instance, as in many others, is much more to prevent the citizen from using his property to his own harm than from employing it to the injury of anyone else. The fact that such is the real purpose is often urged as an objection to such legislation, but not as a reason as excluding it from being classed under the police power.

That the police power includes the field embraced under both of the maxims is no doubt true. If the term includes all the unclassified powers of the state, this will be among them. That it includes much more is equally certain. The example just given is sufficient to show that. The general power used in the leading case of [1]Vanderbilt *vs.* Adams shows it still more clearly. There was no pressing danger in that case either to public or private interests. There was no application of the maxim "*Sic utere tuo ut alienum non lædas*" except by a manifest stretching of it.

The owner of the wharf was not using it to any one's injury. He merely refused, when ordered by proper authority, that of the harbor-master, to change the position of his own vessel to accommodate one coming in. No special damage was shown to have occurred to anyone, but the penalty for refusal was assessed and collected. The case has never been questioned since, and is not likely to be. The necessity for order and authority in New York harbor imposes upon those who use it not only a liability to have their property seized and applied to answer some urgent and unprovided-for need of defense against man or the elements, not only that he shall so use his property as to inflict no needless

[1] 7 *Cow.*, 349.

injury on another, but also that he shall actively comply with proper requirements of the civil authorities in many things, in this case in adjusting and placing his ship to accommodate himself to the other arrangements of the harbor-master.

To say that this power in this instance is necessary is not to characterize it at all. It is necessary, indeed, to the public welfare, in the sense that such welfare would not be as well conserved without it as with it, but in no other. To say of any power now exercised by government that it, also, is not necessary, in that same sense, is to strip that power away as soon as such comes to be the general opinion.

To say that this general authority over persons and property is given merely to prevent them from hurting one another and justify its extension only that far, is to give a ridiculously inadequate interpretation to all the facts of our daily lives and the relations of government to them. Is the only dealing of government with us and our possessions merely to prevent harm to others? Is it all the duty of a citizen to permit without resistance his possessions to be used for the general defense in a public emergency, and to himself abstain from so using such possessions as to injure anyone? A man might, conceivably, be guilty of high treason who had failed in neither.

The suggestion of the [1]German speculators seems to be that the term police should be confined to protective action and legislation. This is, after all, only a difference in form. However it may be in Germany, a little experience with American lawyers and lawgivers will convince one that there is no difficulty in putting a requirement that any particular thing be done for the public good into the form of an elaborate protection against the evils arising from not having it done. As a practical line of division, Stein's suggestion of a danger to be avoided, as furnishing the true occasion for police action, would hardly help much. In this country, those who are called upon to defend our common school system, which has so extensively taken children out of parental control, if not allowed to do so on the ground of providing for the general welfare by extending education, have no difficulty in adjusting themselves to the situation by putting it on the basis of guarding against the evils of an uninstructed electorate.

[1] Stein's *Handbuch der Verwaltungs Lehre*, s. 113 and 186–187; Bluntschli's *Lehre vom Modernen Staat*, Vol. ii, s. 293.

For the ease of passing from negative to affirmative requirements see a recent judicial instance in [1]Geer *vs.* Connecticut, in opinion by Justice White.

[1] *161 U. S.*, 519.

CHAPTER V.

Police Power and Property and Corporate Rights.

We have seen the right of the state courts to pass upon the constitutionality of laws established, and we have seen those courts passing upon that question with regard to what they called police regulations. We have seen those decisions supported by English precedents referring back to the old doctrine of overruling necessity, and also to the maxim of *Sic utere tuo ut alienum non lædas.* That these furnish too narrow a basis for the successful support of legislative authority, when crowded against on the one side by federal restrictions and upon the other by the pressing forward of provisions embodied in state constitutions in defense of personal and property rights, was sought to be shown in the last chapter.

That there must be left to the legislatures of the states a wider latitude of providing for the general welfare, and that as against a too urgent claim of individual rights an appeal would be made to a police power resting upon that principle, just as such power had been developed to support the states against pressure from the side of the federal gevernment, might have been anticipated and was what took place.

The pressing of individualism against prohibitory liquor laws brought the police power under that name into the Illinois Supreme Court in 1852, as has been seen. The case, however, that seems to have really begun the vogue in the state courts of this phrase was [1] Commonwealth *vs.* Alger and the opinion of Chief Justice Shaw of Massachusetts in that case in 1853. This case furnishes a starting point for citations directly relating to the police power in most of the constitutional discussions that embrace the subject. It deserves the position both on its own account and that of the Massachusetts magistrate who wrote the opinion, of whom Choate said that he was always approached with the feeling which a pagan has for his idol—that he was very ugly, but very great.

The question raised was whether the owner in fee of real estate

[1] 7 *Cush.*, 53.

could have his use of it controlled by the state in the interests of the general public. The defendant in the case had been indicted and found guilty of violating certain laws of that commonwealth which forbade the erection of any wharf or the placing of any material for one in certain parts of Boston harbor.

He had in defiance of law built a wharf on the flats before his land, less than a hundred rods from the shore line and so as not to impede navigation, but within the harbor lines where such structures were forbidden. The ancient charters of the commonwealth of Massachusetts gave to such a proprietor along the shore the ownership of the soil to low-water mark:

"Where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further; provided, that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels in or through any sea, creeks or coves to other men's houses or lands."

The ancient charter granting the right to the proprietor long antedated the statute fixing the lines within which it was not permitted to erect or maintain a wharf. There was no question that when the law fixing the harbor lines was enacted the proprietor had an estate in fee simple in the land covered at high tide to the extent of one hundred rods out from high-water mark, and subject only to a limited right of way to ships and vessels, and that such right of way was not impaired by Alger's wharf. Could the legislature invade this right with its harbor lines and prescribe how it should be used and enjoyed?

Chief Justice Shaw says yes:

"We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified his title, holds it under an implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tidewaters, is derived directly or indirectly from the government, and held subject to those general regulations which are necessary to the common good and general welfare."

"Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and

regulations, established by law, as the legislature, under the government and controlling power vested in them by the constitution, may think necessary and expedient."

He proceeds to say that he is not referring to the right of eminent domain:

"The power we allude to is rather the police power, the power vested in the legislature to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same."

It is to be remembered that the chief justice is applying to legislative action that Massachusetts constitution mainly prepared by John Adams and thought by him to represent "Locke, Sidney, Rousseau and De Mably, all combined and reduced to practice."[1]

That constitution declared in the plainest terms the sacredness of[2] property rights, as against both citizen and state. The declaration of rights came first in that constitution, and closes appropriately with an attempt at providing a complete separation of the three powers of government—legislative, executive and judicial—to the "end it may be a government of laws and not of men."[3] It was fitting that its declaration of rights should conclude with this sentiment of Harrington's. That constitution when originally adopted contained property qualifications for the exercising the right of suffrage. According to Harrington's well-known theory, which Webster was accused of holding, property was the true basis and the upholding of it the chief end of government.

It was also fitting, and indeed certain, that just where the constitutional protection of property was most strenuously declared, it would first come distinctly into collision with the assertion of governmental "indefinite supremacy." Judge Shaw had in 1846, in the case of the [4]Commonwealth *vs.* Tewksbury, applied the maxim "*Sic utere tuo ut alienum non lædas,*" and had held that a statute prohibiting the removal of stones, gravel or sand from the beaches in the town of Chelsea was valid. In doing so he made extensive use of English precedents. He made no use of the term police power in his opinion in that case, though it seems to have been referred

[1] *4 Adams' Works*, 216.
[2] Declaration of Rights, Sec. 10.
[3] *1 Poore's Charters*, 949.
[4] *11 Met.*, 55.

to in the argument. In Commonwealth *vs.* Alger he now holds that besides the obligation to refrain from injuring others there is an obligation to obey authority *qua* authority, even if it affects injuriously the use and control of property by the owner. His declaration that all property is held subject to such reasonable regulations as the legislature, in providing for the general welfare, may enact is given above.

Later on, in the same opinion, instancing a powder magazine or a slaughter-house, he asks who will fix the degree of proximity that shall make it a nuisance:

"Every one might agree that two hundred feet would be too near, and two thousand feet would not be, and within this margin who shall say, who can know, what distance shall be too near or otherwise? An authoritated rule, carrying with it the character of certainty and precision, is needed. The tradesman needs to know before incurring expense how near he may build his works without violating the law or committing a nuisance. Builders of houses need to know to what distance they must keep from the obnoxious works already erected in order to be sure of the protection of the law for their habitation. This requisite certainty and precision can be obtained only by a positive enactment fixing the distance within which the use shall be prohibited as obnoxious and beyond which it will be allowed, and enforcing the rule thus fixed by penalties."

The chief justice continues his argument as to the frequent necessity of a fixed boundary, and finally applies it to the harbor, in which he finds that evidently there must be a place where further extension of wharves cannot be tolerated by the public interest. That being so, some one must fix a line, and the proper method is for the legislature to make a law on the subject:

"It is for them, under a high sense of duty to the public and individuals, with a sacred regard to the right of property and to all other private rights, to make such reasonable regulations as they may judge necessary to protect public and private rights, and to impose no larger restraints upon the use and enjoyment of private property than are in their judgment strictly necessary to protect and preserve the rights of others."

Evidently he includes among such rights of others a provision for the public welfare by compelling the observance of regulations as such. The chief justice finds involved in this case a common-law right to free and safe navigation which, he says, all the shore-line proprie-

tors are subject to. He finds a public need for a fixed boundary for the extension of such right, and that one had been established by harbor lines outside of which no private wharf might extend. He finds that Alger's wharf, by an extension built after the law was enacted, passed this line, and that he, therefore, incurred the penalty provided, although there was no interference with the actual use of the public right of way, nothing beyond simply getting outside the line and so violating the law.

The decision is, therefore, an emphatic vindication of public authority as authority, and against rights of property asserted under the Massachusetts constitution. The commanding reputation of Chief Justice Shaw, as well as that of the court over which he presided, with the thoroughness of his discussion of the principles involved, the clearness with which he perceived what it was that he was adding to the English precedents on the same subject, have made this, perhaps, the most distinctly leading case in all the discussions of the relation of the police power to the state constitutions. It comes first under that heading in Prof. Thayer's *Cases on Constitutional Law*. It is the one quoted from by Judge Cooley for his definition in the chapter on this subject in his *Constitutional Limitations*. It figures on page 1 of Prentice's *Police Powers*. That the common law precedents relating to exercise of power by executive officials and subordinate municipal bodies must inevitably have their doctrines widened when applied to the sovereign legislature was a foregone conclusion. That Chief Justice Shaw was there to do it, and do it in old Massachusetts, may be fairly termed another example of what Bancroft considered the care of Providence for the Great Republic. It furnished a distinct foundation for the general doctrine, previously to that time somewhat unconsciously applied, that the sweeping provisions of the constitutions, even where their broad terms seemed contrary to the principles of the common law and to narrow greatly the field of legislation as compared with that occupied by the British Parliament, were made not in opposition to but in forgetfulness of those principles and were not to be given such an effect.

The sound sense of both courts and public established that the property rights which the constitution sanctify are, as Judge Shaw declared, held subject to the controlling power of the legislature. No mere implication from general statements of the doctrine of personal rights was allowed to seriously impair the law-making

power of the people's representatives. Those declarations were properly held to relate to rights already in existence and in practical enjoyment, and restrictions upon the powers of the legislatures, to be brought about at all, must have been made in express terms.

It was as natural as it was fortunate that this prominent struggle between the legislature on the one hand and private interests, asserted upon the basis of the bill of rights, on the other, was over a question in reference to which legislative power had been immemorially employed. It may be noted that in Commonwealth *vs.* Alger we have a recurrence to Taney's gunpowder illustration which suggested the term police power to Chief Justice Marshall. Evidently the use of the term by Chief Justice Shaw is derived through the case of New York *vs.* Miln from Marshall.

Chief Justice Redfield's decision in [1] Thorpe *vs.* Rutland, Etc., R. R. Co. ranks, perhaps, with Commonwealth *vs.* Alger as a landmark in the development of the police power. The company had been chartered in 1843. In 1849, a law of Vermont made it the duty of all railroad companies to fence their lines and to put cattle guards at all crossings. The road claimed that its charter, antedating the law, empowered it to maintain its track and equipment and said nothing about such fences and crossings. It, therefore, claimed that because of this charter it was exempt from any changes in its duties, because the law requiring such additional duties must be held to impair the obligation of the contract contained in the charter. Judge Redfield made short work of the contention that the railroad company had any more rights than an individual would have who had taken the same grant of a franchise to build, equip and maintain a railroad and take toll of passengers. If any privileges belong to the company it must be on account of a special consideration and because given in express terms.

The legislative power he found by universal agreement to be supreme in the English Parliament and to have passed with their independence to the states in the full measure possessed by Parliament, except as it was found to be limited by state or federal constitutions.

"It was supposed that the question was settled in this court in Nelson *vs.* V. & C. R. Company, *26 Vt.*, 717. The general views of the court are there stated as clearly as it could now be done. But as the general question is of vast importance both to the roads and to the public and

[1] *27 Vt.*, 140 (1855).

has again been urged upon our consideration, we have examined it very much in detail. We think the power of the legislature to control existing railways in this respect may be found in the general control over the police of the country, which resides in the law-making power in all free states, and which is, by the fifth article of the bill of rights of this state, expressly declared to reside perpetually and inalienably in the legislature, which is, perhaps, no more than the enunciation of a general principle applicable to all free states, and which cannot, therefore, be violated so as to deprive the legislature of the power, even by express grant to any mere public or private corporation. And when the regulation of the police of the city or town by general ordinances is given to such towns and cities, and the regulation of their own internal police is given to railroads to be carried into effect by their by-laws and other regulations, it is, of course, always in all such cases subject to the superior control of the legislature. That is a responsibility of which legislatures cannot divest themselves, if they would."

"This police power of the state extends to the protection of the lives, limbs, health, comfort and quiet of all persons and the protection of all property within the state. . . . . So far as the railroads are concerned, this police power, which resides primarily and ultimately in the legislature, is twofold: First. The police of the roads, which in the absence of legislative control the corporations themselves exercise over their operatives, and to some extent over all who do business with them or come upon their grounds, through their general statutes and by their officers."

And he proceeds to show what the roads may do and what they may be required to do by legislative enactment, that the rest of the community may be reasonably safe; and his enumeration shows how extensive he regarded the powers of the legislature. He has anticipated most of the modern statutes on this subject:

"Second. There is also the general police power of the state, by which person and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the state. Of the perfect right in the legislature to do which no question ever was or upon acknowledged general principles ever can be made, so far as natural persons are concerned. And it is certainly calculated to excite surprise and alarm that the right to do the same in regard to railways should be made a serious question. This objection is made generally upon two grounds: 1st. That it subjects corporation to virtual destruction by the legislature; and, 2d, That it is an attempt to control the obligation of one person to another in matters of merely private concern."

He then admits that the franchise of a private corporation is private property, and he grants, on the authority of the Dartmouth College case, its right to protection as such, but declines to adopt such a construction as would put the whole subject, not only of railways but all other corporate interests, beyond legislative control. He maintains the right to enact new restrictions reasonably requisite to the public welfare.

He, too, brings up the slaughter-house and powder-mill illustrations, and he, too, cites the American and English cases as to the principles on which executive officers are authorized to interfere with private property—the right to abate nuisances and to act in sudden emergencies, both of which had been so often upheld both in this country and England. He also recognizes as clearly as did Chief Justice Shaw that to support the claim of the legislature to the power he is sustaining to its full extent, he must draw upon something more potent and get something from the supreme legislative authority of Parliament.

Whether Judge Redfield, or Judge Shaw, or Judge Trumbull in People *vs.* Jones perceived distinctly that in holding the constitutional provisions in the bills of rights to have been enacted with reference to the principles and precedents of English law, and not to be considered to interfere with such principles unless they did so in explicit terms, they were making that law and those precedents the real constitution of their states, more or less in disregard of those principles of "Locke, Sidney, Rousseau and DeMably combined and reduced to practice," which John Adams thought had been enacted, is not quite clear.

Chief Justice Redfield closes:

"We conclude, then, that the authority of the legislature to make the requirement of existing railways may be vindicated because it comes fairly within the police of the state. 2. Because it regards the division fence between adjoining proprietors. 3. Because it properly concerns the safe mode of exercising a dangerous occupation or business; and 4. Because it is but a reasonable provision for the protection of domestic animals, all of which interests fall legitimately within the range of legislative control, both in regard to natural and artificial persons."

The police power, now fairly under that name, just a little past the middle of the century, had fully inaugurated its struggle to maintain government control over corporate aggressiveness and pri-

vate property interests, intrenched behind constitutional provisions. This struggle, begun as we have seen in a conflict with federal authority in Brown *vs.* Maryland and continued for twenty-five years in the federal Supreme Court, was now to go on for a time in the state courts.

The vast new interests created by railway development were practically all under state laws. The bringing of those interests to submit to legislative control inevitably produced conflicts. The extension of legislative power to new subjects, where its action was to be justified only by analogy to old precedents and not by the direct application of them, offered special openings for the exploiting of the meaning of general expressions in the state constitutions.

Then, too, the extension across the country of lines of railroad, controlled by great corporations established in other states, strongly tended to precipitate conflicts. The people, whose capital was thus placed under the control of a distant legislature in another state, were jealous and afraid. The lawmakers of that state too often were hostile and regarded the owners of the property and corporate interests as to which they were legislating as aliens, if not interlopers. The case of Thorpe *vs.* Rutland, Etc., Ry. Co. has been perhaps the most influential case in settling the line along which the power of the state legislatures over railway corporations has been asserted and maintained.

CHAPTER VI.

The Police Power and State Constitutions and Liquor and Sunday Laws.

The force of popular feeling meanwhile had introduced another line of legal disputes over the authority of the legislature in the states. It has been mentioned that the Supreme Court of Illinois in 1852 declared that total prohibition of sales of intoxicants for use as beverages was a proper exercise of the police power. Licensing legislation had long been recognized especially in New England, and Judge Trumbull had no difficulty in extending the precedents to complete prohibition.

During this and the few years immediately preceding and following, a great wave of sentiment in favor of compulsory temperance had gone across the country and so a number of cases in the higher courts relating to this subject resulted. In 1853, the next year after the decision just mentioned in Illinois, came the case of Our Home *vs.* The State in Iowa, in which the question was as to the validity of a law forbidding sales of intoxicants as beverages and condemning as public nuisances places where they were sold in violation of the law. Justice Woodward, another New Englander, in a strong opinion upholds the right of the state to legislate upon this matter in the way it had done, and discusses the whole subject in the light of The Mayor of the City of New York *vs.* Miln. He cites, too, the License cases and especially a decision by Judge Shaw in Massachusetts, McGirr *vs.* Fisher, in which also the Massachusetts chief justice acted upon English and early American precedents, far more than modern constitutional provisions, in upholding a liquor law of that state. Judge Woodward found the Iowa law valid against all claims of the sacredness of private property.

In the following year, 1854, Michigan, in [1]People *vs.* Hawley, following principally the federal cases, finds the prohibition of sales of intoxicating liquors a rightful use of the police power. But the

[1] *3 Mich.*, 330.

same question was in Indiana, in [1]Beebe *vs.* The State, decided otherwise by a majority of the state Supreme Court in a judicial debate almost as energetic as any of those in the federal Supreme Court.

Here the new constitutional doctrines were fully exploited, and are characterized as the "great discovery" of rights in the people as against the legislature, as well as against executive officers. The court holds, through Chief Justice Perkins, that a law forbidding any sales of intoxicating liquors except by the agent of the state, and by him only for certain named purposes, is an unwarranted invasion of "industry" as well as of individual rights. The dissenting opinions by two of the judges are very interesting, as showing what is the real basis supporting the claim for extended police power for the states, namely: The feeling of its absolute necessity and the fact of its long exercise.

Indeed, the first reason, which is always dwelt upon, evidently arises in large degree from the latter. Because the community has not done without such use of political power is evidently in large part the foundation of the fear that it cannot do so. It is interesting to note that the majority of the court, in holding that the legislature had no power to pass the law, do not propose to limit absolutely the sovereignty of the state. They still hold that the state can pass such a regulation, but they say the state is the sovereign and not the legislature. The constitutional restrictions they think have not left so much power in the legislature, and they argue the sovereignty of the people in the state in terms like those of James Wilson in the early decisions of the federal Supreme Court and in his lectures.

The Indiana Supreme Court was not alone in thus standing out against extreme prohibition by act of the legislature. The New York Court of Appeals in 1856 passed upon the cases of [2]Wynehamer *vs.* The People and The [2]People *vs.* Toynbee. The legislature of New York in 1855 passed an act making it the duty of every sheriff, constable, marshal or policeman to arrest any person whom he might see actually violating section 1 of the act.

This section provided that intoxicating liquors should not be sold or kept for sale by any one anywhere, nor given away, nor kept for that purpose anywhere except in a dwelling-house, in no

[1] *6 Ind.*, 501.

[2] *13 N. Y.*, 378.

part of which was any tavern, store, grocery shop, boarding-house, or room kept for gambling, dancing or other public recreations, and should not be kept or deposited in any place except such dwelling-house, or for sacramental purposes in a church, or in some place where a trade or art was carried on demanding use of the same as part of a regular business, or in transportation to some such lawful place.

Liquor might be given away by a physician in his regular practice and the law was not to apply to any liquors permitted to be sold by any treaty or law of the United States. It was made the duty of any officer making an arrest under the act to seize all liquors kept in violation of the law together with the vessels in which it might be, and at once convey the person arrested before a magistrate and store the liquor and make complaint of the violation of the law to the magistrate. All the liquor so seized, on conviction of the person so arrested, if not claimed by some one else, was to be forfeited, and when so forfeited to be destroyed on warrant from the magistrate, and the vessels sold on execution.

Police magistrates, justices of the peace, county judges, city judges and recorders had power to act in such cases and to hold courts of special sessions to try such offenses, and need not hold an examination of any person brought up on such charge, but might proceed to trial as soon as the complainant could be notified. They had power to adjourn for good cause not longer than twenty days. A jury of six was to be called if demanded by the defendant at the time of pleading. No one in the business of selling liquors or who had been convicted under the act could serve as juror, and proof of sale established *prima facie* that it was unlawful, and proof of delivery should be held to show a sale.

The convicted party forfeited all liquors kept by him contrary to the law, was fined fifty dollars for first offense, one hundred dollars and thirty days in jail for second, and for subsequent offenses not less than one hundred nor more than two hundred and fifty dollars, with imprisonment from three to six months, and if fine and costs were not paid, confinement for not less than one day for each dollar so unpaid was required. There was a provision for sale of liquors by specially authorized persons for medicinal, mechanical and sacramental purposes, and also for the sale of domestic wines and cider, and also for the sale of liquors imported under protection of the United States laws by the persons importing them,

and also for the sale of articles containing spirits but not drinkable. A further clause provided that no one could maintain an action on account of liquor sold without proving a sale in all respects in accordance with law; and there was another that all liquors kept in violation of the law should be deemed a public nuisance and summarily destroyed.

Wynehamer had been indicted for selling intoxicating liquors in violation of the law just recited. In accordance with the act evidence was introduced tending to show that brandy was sold to several people at his bar in Buffalo on July 4, 1855, and drunk on the premises. With that the state rested. The court was asked to discharge him because no offense had been shown; and that it did not appear but that the liquor sold was imported and such as he had a right to sell; and that the act was void as violating the provisions of both state and federal constitutions in respect to unreasonable searches and seizures, and depriving him of propperty without due process of law; and that it had not been shown that the liquor was not authorized to be sold under the law. The request was denied, and he offered to prove that the liquor was drawn from an imported package on which duty had been paid; and the evidence was refused. He offered to prove that the liquor was owned by him and in his possession before the law went into effect, which was also refused. He was found guilty, fined fifty dollars and costs. This judgment, having been affirmed by the state Supreme Court in banc, was brought for review to the Court of Appeals.

Toynbee was arrested by a police officer in Brooklyn, who made information to seeing him have brandy and champagne and seeing him engaged in selling it, and that defendant was brought before the magistrate to be dealt with according to law, his liquor having been seized. He asked to be discharged because of the unconstitutionality of the law. This was denied. He pleaded not guilty and was convicted on evidence of having and selling liquor alone, and was fined and the liquors ordered to be destroyed. This judgment was reversed by the Supreme Court in banc, and the state took the case to the Court of Appeals, where the two were heard together.

Touching the constitutionality of the law as affecting property rights at the time of its enactment, the court by Justice Hubbard says:

"This is purely a question of legislative power under the fundamental law. It is needless to say that the court has no concern with the wisdom or expediency of the enactment to accomplish the ends indicated by the title. The police of this government from its foundation certainly vindicates the political necessity and economy of stringent laws circumscribing the sale of spirituous liquors.

"I entertain no doubt of the constitutional competency of the state legislature to prohibit entirely the commerce within the state in liquors as a beverage by laws prospective in their operation. . . . . The police power is of necessity despotic in its character commensurate with the sovereignty of the state, and individual rights of property beyond the express constitutional limits must yield to its exercise, and in emergencies it may be exercised to the destruction of property without compensation to the owner and without the formality of a legal investigation. . . . . I know of no limits to the exercise of the police power vested in the legislature except the restrictions contained in the written constitution. . . . . The grant of power in that instrument is generally of all the legislative power of the state; what this expressly is cannot well be defined."

He finds in the legislature all the power of that nature in the state subject to the restrictions in the bill of rights, and affirms that there is no right in the courts to set any higher-law limits. He finds the law under consideration bad, as acting upon existing property rights and not merely a regulation governing future transactions. He finds that due process of law means by a judicial proceeding, and that the statute in declaring all liquors held for use as beverages a nuisance and subjecting them to forfeiture as a deprivation without due process of law and is a despotic act, inasmuch as the liquor is not, *per se*, a nuisance.

This, together with the abolishing of all right of sale within the state, makes it, in his opinion, an act of confiscation. He also holds the law bad as denying a regular jury of twelve men, which he holds to be guaranteed to every man charged with an offense for which he may be deprived of his liberty. Two of the judges, however, thought the law was valid.

This law has been given as an extreme instance of severe legislation prevalent at that time and the strongest upholding of constitutional property rights which is any longer cited with any approval, and this case is generally disapproved. The decisions of about the same time upholding such laws of other states not quite so stringent in their terms do not generally show much regard for any

damage to the value of property on hand by reason of the preventing of sales. There is in the same year, 1856, a Connecticut case, [1] State *vs.* Wheeler, a law that in general terms prohibited entirely the selling and keeping for sale of intoxicants to be used as a beverage is held valid and a proper exercise of the police power, notwithstanding any effect which it might have upon the value of property on hand or contracted for.

[2] People *vs.* Gallagher, in *4th Michigan*, is to the same effect; and also holds it doubtful whether a law is ever bad merely for contravening some general principle or constitutional right and not any express declaration of the constitution. This case shows how thoroughly the courts were prepared to enforce common-law doctrines and follow precedents formed under a legislature which recognized no express limits to its powers.

It is interesting to compare these decisions with another of the same period in regard to the constitutional provision that property should not be taken away without due process of law, and see the way in which this ancient provision was transferred from its old office of limiting the action of the executive to its American one of answering a like purpose with regard to the legislature. The case is that of [3] Murray *vs.* Hoboken Land, Etc., Company, decided in 1855 in an opinion by Justice Curtis.

Collector of Customs Swartwout, of New York, had been found in 1838 nearly a million and a half of dollars in default in his accounts with the federal government. A distress warrant had during that year been issued against his property by the solicitor of the treasury and levied upon his lands. The lands were in June, 1839, sold by the United States marshal to the defendant company. In the meantime certain other creditors of his procured judgments and had levied executions on the same land in April before.

They claimed the levy and the sale under the distress warrant was void and proceeded to sell under their execution to the plaintiff Murray who then brought an action of ejectment, claiming that a sale under a mere distress warrant from the treasury was not due process of law, and that the constitution of the United States vested the judicial power of the federal government "in one Supreme Court and such inferior courts as Congress may from time

[1] *25 Conn.*, 290. [2] *4 Mich.*, 244. [3] *18 How.*, 272.

to time ordain and establish;" and further that such judicial power should extend "to all controversies to which the United States should be a party."

The resolution by Judge Curtis of the question thus raised is so typical of the American way of dealing with such problems and of the whole development of our subject that it deserves analyzing in this connection. After admitting that the provision vesting all judicial power in the courts was conclusive, if the act of adjusting the account and ascertaining the balance due that might be levied for was a judicial act, he turns entirely away from that question until he shall first have answered the other, as to whether the distress warrant and the sale under it were due process of law. To settle this, of course, he turns back to the English precedents and shows, first, that the phrase as we have it is simply Lord Coke's version of "law of the land" in Magna Charta. Then he examines further to see whether under the old precedents similar proceedings were a part of the law of the land in England, and, of course, as the proceedings were simply copied from English practice, he finds no difficulty there. Then he finds in the laws in nearly all the states evidence that this difference in the proceedings against public defaulters from those against ordinary debtors was well known and long practiced in this country. Therefore, it must have been a due process of law when the constitution was adopted and to have been forbidden by it needed to be expressly mentioned.

So much is easy; and is exactly the process by which in Massachusetts [1] Soper *vs.* Harvard College, [2] Nightingale's case and [3] Goddard's case, and in Maine [4] Pierce *vs.* Kimball, and in New York [5] Vanderbilt *vs.* Adams and [6] Coates *vs.* Mayor, were decided, and the exercise of summary powers by magistrates, and the laws conferring such powers, sustained against the general language of the state constitutions. The practices were in existence; they were well known; if it was intended to do away with them, it would have been done in express terms. Above all, they were needed. So, although it is admitted by Justice Curtis that due process of law, in cases requiring a trial, demands that there be regular parties, a tribunal and a course of procedure assuring a

[1] *1 Pick.*, 177.
[2] *11 Pick.*, 168.
[3] *16 Pick.*, 504.
[4] *9 Me.*, 54.
[5] *7 Cow.*, 348.
[6] *Id.*, 585.

hearing, yet, as there had been in England from time immemorial cases where liability was fixed by a simple declaration of the king's accounting officer, notwithstanding Magna Charta, so in this country the same might be done, notwithstanding the constitution.

The other question, as to the exercise of judicial power by the accounting officers in making a statement of Swartwout's account and issuing on it process against both his person and property, is treated in the same manner and on the basis of the same precedents, but they are not applied with the same confidence. The same result is reached by similar means, but not with the same directness.

Judge Curtis does not in express terms find in the British government the doctrine of a separate judiciary. He goes no further than to assume it. The requirement of due process of law being in substance in the great charter, English precedents in this case, where an act of executive officers was in question, fairly applied to it; but no hard-and-fast line between judicial and executive acts had ever been attempted in England. To this question it was harder to find English authorities to fit. So it happened that this portion of the opinion is simply a fairly conclusive argument that an absolute division is impossible, and that the precise boundary between the two, if there is to be one, must be fixed by Congress or simply by usage. Of course, the fact that the delinquent could take an appeal from the finding of the accounting officers to the courts and have the whole matter retried there, left Judge Curtis very little standing room from which to claim any very essential difference in nature between the power exercised by the accounting officers and that exercised by the courts, at least in this matter.

The way in which the old precedents are finally applied to the determination of this question, also, of judicial or non-judicial power, shows the relations of the ancient parts of our law to the newer constitutions, and is worth examining. After finding in the matter one in which it depended upon the will of Congress whether the act of ascertaining the balance due and issuing process to collect it should be given to the courts as a judicial or retained by the treasury as an executive function, and a part of the duty of collecting the revenue, another distinction must be drawn, or else everything would be liable to depend upon the will of Congress as

to whether it should go to the courts for determination or be peremptorily decided by executive officers. So he holds that in collecting the revenue the entire jurisdiction is in the United States; and it can deal summarily with its officers and is not amenable to process, and its submitting to an appeal to the courts is a mere voluntary concession on its part.

But notice the limit that he finally puts upon this power on the part of Congress thus to place questions among judicial or non-judicial ones as it may please:

"We do not consider Congress can either withdraw from judicial cognizance any matter which from its nature is a subject of a suit at the common law, or in equity or admiralty, nor, on the other hand, can it bring under the judicial power a matter which from its nature is not a subject for judicial determination."

In other words, if the matter in question is such as have heretofore gone to the courts of law, equity, or admiralty, to get their opinion before the executive can act, to them under the constitution it must continue to go. The precedents are to settle it. If, on the contrary, it is such as have been heretofore determined by the executive and ministerial officers of the government without such consulting of the judiciary, then they may continue to exercise that power till Congress chooses to say they must lay it aside; and if the putting of it into the hands of the courts would involve too grave a departure from usage that may not be done.

The final result is that this admired and admirable decision is determined in all respects by precedents long antedating the constitution. A long discussion at the bar and the production of this opinion seems the only immediate effect of establishing by the constitution three coördinate powers in the state. It is, however, probable that it is not by any means altogether so. There are precedents and precedents and they may be applied in various ways. It is by no means certain that we are where we would have been had there been no distinct declaration in favor of a strict separation of judiciary, executive and legislature. The doctrine has, at all events, not been without its effect upon the development of the police power, as has been seen.

Meanwhile, the new phrase was passing out of the decisions into text-books and treatises. In 1857, Judge Sedgwick published his *Construction of Statutory and Constitutional Law*. In this he gives considerable place to the police power chiefly from the point of

view of Judge Shaw as set forth in Commonwealth *vs.* Alger. Judge Sedgwick evidently regards the police power and the [1] "general power over private property which is necessary for the orderly existence of all governments" as being the same thing. He discusses the police power mainly as a limitation on rights of private property, and with regard to the extent to which it must be held to qualify the apparently absolute guarantees of such property rights in state and federal constitutions.

His point of view is that which regards the power as one of control for the benefit of society and as a great reserved social right not mentioned by the constitutions but in view of which they are always to be interpreted. It is with him, as with the judges we have so far seen dealing with it, a designation for the indefinite remainder of government authority which is left when the familiar and more or less definite forms are abstracted.

Besides Commonwealth *vs.* Alger, Judge Sedgwick quotes most prominently [2] Vanderbilt *vs.* Adams. He does not seem to have noticed Chief Justice Redfield's opinion in Thorpe *vs.* Rutland, Etc., Ry. Co., though he notes with approval the adoption by that distinguished judge in [3] Armington *et al. vs.* Barnet of the doctrine of the case of [4] Charles River Bridge *vs.* Warren Bridge.

At the same term with the case of Murray *vs.* Hoboken Land Company, the case of [5] Smith *vs.* Maryland was passed upon in an opinion also by Justice Curtis. In that case the state of Maryland had forbidden the taking of oysters from beds within its territory by means of a scoop and had provided that vessels engaged in doing so should be forfeited if captured. The law was enforced against a Philadelphia sloop, which had a license from the United States as a coasting and fishing vessel. The control of the State over its own fishing grounds was held to be ample to sustain such legislation.

In this term came to an end the famous [6] Wheeling Bridge case, in a holding that Congress had authority to legislate as to bridges over navigable streams so far as they affected the navigation of the streams. The final authorization of the bridge by Congress was upheld.

Into the bitter waters of the controversy over the Dred Scott

[1] P. 435, Pomeroy's ed.
[2] *7 Cow.*, 348.
[3] *15 Vt.*, 745.
[4] *11 Pet.*, 420.
[5] *18 How.*, 77.
[6] *2 Id.*, 421.

case of the following term it is not necessary for us to venture. Both Chief Justice Taney and Judge Curtis, in passing upon that case, discuss, incidentally, the police power of the states, but that case added nothing to the subject. It only sufficed to remove for a while the discussion of the police power from the federal Supreme Court, and led to its exemplification elsewhere in the form of [1] military law.

When the country was taking its citizens by hundreds of thousands and placing them in front of hostile cannon, was destroying lives and property with a rapidity unexampled in history, and popular enthusiasm was urging it on to greater sacrifices of either or both, if only the fabric of the nation might stand, secure and triumphant over all its enemies, there was not much opportunity or disposition to discuss police or question the rights by which government does things.

In the years just prior to the war the contest over prohibitory liquor laws was determined in most of the states along the same lines of upholding state authority where it has since rested. The right to control chartered corporation when necessary became established in accordance with the views of the cases already cited. Thorpe *vs.* Rutland, Etc., Ry. Co. remained, perhaps, the most influential, and is the case usually cited as laying the foundation for the doctrine that the police power cannot be alienated. On the basis reached in these years, 1856, 1857 and 1858, the police power remained until the ordinary machinery of the law commenced its work again in those regions of the country where it had been with other laws "silent amid the shock of arms."

As showing how the development of the police power was related to the growth of constitutionalism and as showing the latter's dependence upon ability to throw aside precedents, the California habeas corpus case, in 1858, [2] *ex parte* Newman, with its dissenting opinion by Judge Field, later of the United States Supreme Court, is interesting.

The applicant for a release was an Israelite convicted of a violation of a not very stringent law of California for the "better observance of the Sabbath." He pleaded that his religion consecrated the seventh day, and that the law was in conflict with a provision of the state constitution that all persons should have

[1] Hare's *Am. Con. Law*, 761–784.

[2] *9 Cal.*, 503.

"free exercise of religious professsion or worship without discrimination or preference."

The court held that the law in selecting the Christian Sabbath and providing for its observance declared a preference in favor of those professing such religion, and that the law was unconstitutional and void. Judge Field dissented and cited the numerous cases in other states, notably Pennsylvania and Ohio, and the immemorial exercise of such power by legislatures, but in vain.

The majority of the court were in favor of applying the constitution liberally according to its terms and did so. [1] But it was only a matter of a few years when the conception of the uses and powers of government had become more settled, and had been strengthened by the civil war, that California joined the list of states which interpret their constitutions by common law precedents and uphold the observance of the Sabbath.

When this was done it was on the ground that such requirement was a valid police regulation; that to obtain the full benefit of a day of rest there must be uniformity in its observance, and that it is the right and duty of the state to secure such uniformity. We see in this case again the vindication of public order for its own sake, as before in Vanderbilt *vs.* Adams and Commonwealth *vs.* Alger.

[1] *Ex parte* Andrews, *18 Cal.*, 678.

CHAPTER VII.

The Constitutional Amendments and the Slaughter-house Cases.

As has been suggested there was scarcely any development of our subject during the civil war. Immediately after it sprang up the great questions as to the status of the lately revolted portions of the country and its people. The assertion of authority on the part of the federal government had become habitual and easy, but as soon as legislative action was resumed at the south it was found that it was in the hands of those persons lately in rebellion. The results were unsatisfactory. Indeed, at that time pretty much anything they could have done would have been unsatisfactory to the dominant sentiment at the north, whose real grievance was not so much at their manner of exercising power, as at the fact of their having it to exercise.

[1] "The law derives its contents, not out of the development of the legal idea, but out of the needs of life which call for it. This life is, therefore, the law-making force" (Rechtsbildende Kraft).

The life of the state was to give a new form to the federal constitution, first, by the thirteenth amendment declared adopted in December, 1865, that neither slavery nor involuntary servitude except as a punishment for crime should exist under the jurisdiction of the United States. A few months showed that the return of the seceded states was not going to be the simple thing that President Lincoln had hoped for and President Johnson insisted it must be. Northern public opinion or, perhaps, more accurately northern political sentiment, would not do without what its leaders denominated "a substantial guarantee of the fruits of the war." The reconstruction committee of the two houses of Congress, therefore, while several of the states were still practically under military government, brought forward and procured Congress to propose the fourteenth amendment, which was declared

[1] Stein's *Handbuch der Verwaltungs lehre*, S. 41.

ratified by two different proclamations, one of July 20 and one of July 28, 1868. The ratification was by several of the southern states a compliance with a condition imposed by Congress that only upon such ratification would representatives from those states be admitted to the federal legislature.

The amendment is in five sections and much of it has only to do with temporary political conditions that have long gone by, it is hoped never to return. The first section, however, after providing that every person born in the United States and subject to its jurisdiction shall be a citizen both of the United States and the state in which he lives, ordains that

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Sections 2, 3, and 4 are, as suggested, of present importance only to the historian.

The first section and the fifth, which gives Congress power to enforce the article by appropriate legislation, have produced that new development which renders it possible for the editors of the last edition of Bouvier's *Dictionary of the Law* to say truly, under the head of "Police Power," that there has been a vast development of this subject in this century, and most of it in the last thirty years. It was thirty years last July since, under the pressure of refusal of Congressional representation otherwise, five of the southern states ratified this amendment and it became part of the federal constitution. Public attention was strongly directed to it and yet, so long does it take for legal disputes to reach a crisis under our system, that it was not until 1872 that a case involving its construction came before the federal Supreme Court.

When it did so come, the question raised was as far as possible from being connected in any way with the civil convulsions that had, as Dicey says, awakened the American sovereign from a [1] lethargy of more than fifty years, and led to a change in the federal constitution. The question raised had to do simply with the butcher's business in the city of New Orleans. It is not too much to say, however, that the opinion of Judge Miller in the

[1] *Law of the Constitution*, p. 140.

[1] Slaughter-house cases marks as important a turn in the constitutional history of our country as any ever rendered in that court.

In 1869 the legislature of the state of Louisiana chartered the Crescent City Live Stock Landing and Slaughter-house Company, and gave it the exclusive right for twenty-five years of keeping and maintaining in three parishes of that state, embracing 1134 square miles and including the city of New Orleans, landings and yards for live stock, intended for sale or slaughter, and of keeping slaughter-houses for such stock; and forbade all other persons from maintaining such places in the three parishes. The act prescribed the terms on which the public should have the use of such appliances, and that they must be adequate, and fixed the locality in which they must be placed. Here was a considerable area and a large population affected, and about a thousand men, previously engaged in supplying this population with meat, whose independent business was destroyed.

The state courts upheld the law. The United States Circuit Court for Louisiana held it a violation of the provisions of the fourteenth amendment, and numerous cases came into the federal Supreme Court by proceedings in error from the state court and by appeals from the United States Circuit Court. All were finally settled except three. These were argued in January, 1872, in the absence of Justice Nelson. The eight other justices apparently divided equally as to the cases. At the next term, Justice Nelson having retired and Justice Hunt having taken his place, they were again elaborately argued. Mr. Campbell, who had abandoned the position of judge in this very court to take service on the southern side, appeared now to contest the power of his own state to enact such a law. April 14, 1873, Judge Miller rendered the decision in an opinion which, by a bare majority of one, was that of the court. The dissenters were Chief Justice Chase and Justices Field, Bradley and Swayne.

Judge Miller holds that the providing where and how and by whom such places shall be maintained is a proper exercise of the police power of a state, citing especially Gibbons *vs.* Ogden, New York City *vs.* Miln, and the later cases of the United [2] States *vs.* DeWitt, in 1869, and the [3] License Tax cases in 1866: the former being a holding that the Congress of the United States has no general power of police regulation within the state, and holding

[1] *16 Wall*, 18. [2] *9 Wall*, 41. [3] *5 Wall*, 462.

void an act of Congress providing for the punishment of persons mixing and selling certain dangerous inflammable oils; and the License Tax cases being a holding that Congress has no such power, and that payment of a United States license tax procures no right to carry on in a state a business which that state forbids.

Judge Miller thought the Louisiana statute under consideration well calculated to regulate and bring under proper control the business in question, and he cites the precedents in English legislation and decisions. He finds that the famous case against monopolies, reported by [1] Coke, was a struggle against the power of the crown, and not against parliamentary legislation, and that if restraints are to be put on such legislation in this country they must be found in state or federal constitutions, and, so far as federal courts are concerned, in the latter.

The claim of the plaintiff was that the Louisiana act involved the creation of an involuntary servitude contrary to the thirteenth amendment; that it abridged the privileges and immunities of citizens of the United States; that it denied them the equal protection of the laws, and deprived them of property without due process of law, all in violation of the fourteenth amendment. It was evident that these amendments might be so interpreted as to leave the states the "mere shell of legislative power." The thirteenth amendment, Judge Miller finds, simply intended to abolish negro slavery and all other forms of that evil and place it beyond resurrection. The institution, he said, perished of the bitterness of the conflict itself had caused, and even before President Lincoln's proclamation was at an end almost universally within our army lines. He declines to take the simple and therefore impressive declaration in our fundamental law of this great fact from its purpose and apply it to what are known as servitudes of property in the common law, with which it had no relation.

"The process of restoring to their proper relations with the federal government, and with the other states, those which had sided with the rebellion, undertaken under the proclamation of President Johnson in 1865 and before the assembling of Congress, developed the fact that notwithstanding the formal recognition by those states of the abolition of slavery, the condition of the slave race would, without further protection of the government, be almost as bad as before. Among the first acts of legislation adopted by several of the states in the legislative bodies which

[1] *11 Rep.*, 85.

claimed to be in their normal relation with the federal government were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives of self-interest and humanity."

"They were, in some states, forbidden to appear in the towns in any other character than as menial servants. They were required to reside on and cultivate the soil, without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced."

"These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the federal government safely through the crisis of the rebellion and who had supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the fourteenth amendment, and they declined to treat as restored to their full participation in the government of the Union the states which had been in insurrection until they ratified that article by a formal vote of their legislative bodies."

Judge Miller then goes on to say that this did not prove sufficient and a few years later the fifteenth amendment—that suffrage should be denied to no one on account of race, color or his previous slavery—was added for the same reason.

"We repeat, then, in the light of this recapitulation of events almost too recent to be called history, but which are familiar to us all, and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each and without which none of them would have been even suggested—we mean the freedom of the slave race, the security and firm establishment of their freedom and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only in the fifteenth amendment is the negro in terms mentioned; but it is just as true that each of the other articles was addressed to the grievances of that race and designed to remedy them as the fifteenth."

"We do not say that no one else can have this protection. Both the

language and the spirit of these articles are to have their fair and just weight. . . . . But what we do say, and what we wish to be understood, is that in any fair and just construction of any section or phrase of these amendments it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the constitution until that purpose was supposed to be accomplished as far as constitutional law can accomplish it."

Discussing the holding in the Dred Scott case that no negro might become a citizen and the first clause of the fourteenth amendment, making all persons born in and subject to the jurisdiction of the United States citizens both of it and of the state of their residence, he says this not only settles the question raised in that case, but recognizes and establishes a distinction between federal and state citizenship. He must reside in a state to be its citizen. He need only be born in its jurisdiction, or naturalized, to be a citizen of the Union. So he thinks the clause

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"

has no reference to a state dealing with its own citizens as such. The rights of citizens of the states have no additional protection in that character.[1]

"Its sole purpose was to declare to the several states that whatever those rights as you grant or establish them for your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same neither more nor less shall be the measure of the rights of citizens of other states within your jurisdiction."

Of course, this causes the provision under consideration to have the effect of simply extending the protection formerly given to citizens of the several states by clause 1, section 2, article 4 of the constitution, under the new provision also to citizens of the United States.

[2] "Where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the states?" If so, "not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged, but that body may in advance pass laws limiting and restricting the exercise of the legislative power by the states in their most ordinary and usual func-

[1] *16 Wall*, pp. 71–77. [2] *Ia.*, 78.

tions, as in its judgment it may think proper on all subjects; and still further, such a construction followed by the reversal of the judgments of the state of Louisiana in these cases would constitute this court a perpetual censor upon all legislation by the states on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights as they existed at the time of the adoption of this amendment."

"The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument; but when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institution, when the effect is to fetter and degrade the state governments by subjecting them to the control of Congress in the exercise of power, heretofore universally conceded to them, of the most ordinary and fundamental character, and when in fact it radically changes the whole theory of the relations of the state and federal governments to each other and of both these governments to the people, the argument has a force that is irresistible in the absence of language which expresses such a purpose too clearly to admit of any doubt. We are convinced that no such results were intended by the Congress which proposed these amendments nor by the legislatures of the states which ratified them."

Going on, Judge Miller describes some of the "privileges and immunities of citizens of the United States," mentioning the right of passage into and across other states, vindicated in [1]Crandall *vs.* Nevada, and quotes Chief Justice Taney's [2]declaration on that subject which has been given before. The right to claim protection on the high seas and in foreign dominions, to assemble and petition for redress of grievance and to the privilege of the writ of habeas corpus are pronounced federal rights guaranteed by the United States constitution.

The claims that the Louisiana law in question deprived of property without due process and that its action was a denial of equal protection of the laws to the butchers are brushed lightly aside. As to the first he only calls attention to the fact that the provision is not a new one in constitutional law, and that such acts as the one in question had never been held to fall within its prohibition in all the litigation over these terms since they were first substantially adopted in Magna Charta. The second he sets aside as not within the purpose of the amendment which had been simply to provide protection for the negroes.

[1] *6 Wall*, 36.

[2] *Supra*, p. 5[c].

In this connection Judge Miller makes his often-quoted prophecy so thoroughly falsified in recent years:

[1] "We doubt very much whether any action of a state not directed by way of discrimination against the negro as a class or on account of their race will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency that a strong case will be necessary for its application to any other."

He does not, however, entirely commit himself to its total inapplicability to any other:

"As it is a state that is to be dealt with and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of state oppression by denial of equal justice in its courts shall have claimed a decision at our hands. We find none such in the case before us."

The dissenting opinions are as to both the matters discussed by Judge Miller, both the character of the state law and the extent of legislative ground covered by the prohibitions in the amendment. The power of Congress to legislate, touched upon by Judge Miller, was not really involved in the case, and accordingly the dissenting opinions refer to that, as indeed he does, merely for the light which that clause in the amendment may throw upon the meaning of the one over which the contention is. The dissenting judges take the position that the act itself creates so unreasonable a monoply as to take it outside of the acknowledged jurisdiction of the legislature to prescribe how within city limits employments of the kind dealt with may be carried on.

The main controversy and point of disagreement, however, is as to the meaning of the clause "abridge the privileges or immunities of citizens of the United States," and what power was given to Congress in authorizing it to legislate to prevent the states from abridging it. Judge Field thought that it secured equal rights to all citizens of a state by virtue of their all being citizens of the United States, and that consequently it forbade any such monopoly as the Louisiana law created. Judge Bradley calls attention to the fact that the power of Parliament to create monopolies cannot be appealed to in this country by way of precedent as against constitutional provisions. He insists that the constitutional provisions in America have the same application to the legislature that

[1] *16 Wall*, 81.

the great charter had in Great Britain to the officers of the crown, and that the English theory of the omnipotence of Parliament was never transferred to this country.

The points of controversy in the court seem to have been: 1. Was the privilege of exclusively maintaining slaughter-houses conferred by the law a monopoly violative of common right? 2. Granting that it was such a monopoly, was authority to deal with and rectify the wrong given to the federal courts under the fourteenth amendment, and was state action in this direction and of the character involved forbidden by the fourteenth amendment in cases in which it would have been constitutional before its adoption? Judge Miller and the court answer both questions in the negative, the dissenting judges both in the affirmative.

It would seem that the growth of decisions over these questions starting from this point have tended more and more to confirm the court's determination over the real points decided, while it has overthrown completely not a few of Judge Miller's dicta. That the control of slaughter-houses for a great city is within the police power of the state, and if it solves the difficulty by giving their maintenance wholly to one company, its action may still be defended on that ground, and is not open to the same objection as if it were merely conferring an exclusive trading or manufacturing privilege, unconnected with its police power and not competent for it to bestow, seems certain. The making of "privileges or immunities of citizens of the United States" cover a right to carry on the business of slaughter-houses in any of the great cities would now seem a fanciful stretch of the fourteenth amendment, and the holding that the police powers of the state were not diminished by the fourteenth amendment, but only brought under the supervision of the federal government, and improper uses of it made subject to the jurisdiction of the federal courts, is now firmly established.

It is true that the latter fact has led to an application of the amendment on a far wider scale than Judge Miller anticipated. He himself lived long enough to see the amendment chiefly used not to vindicate the rights of the colored race, but principally for the correction of unjust and unreasonable classifications of citizens and subjects of legislation in what may be called the police laws of the states and to set aside unjust laws of taxation.

It is easy to see that by merely adopting the broad construction of the terms "privileges or immunities of a citizen of the United

States," for which the minority contended, the greater part of what we know by the term police power would have been transferred to the federal government if such construction had been sustained and persisted in. Perhaps it must be admitted that in doing the contrary, in applying the narrow meaning he gave to them, he rendered them practically meaningless. It is certain that the political leaders who had procured the proposal and ratification of the amendment were bitterly disappointed.

His determination, however, is in accordance with the settled habits of the American people, and he could safely calculate that such habits would prevail over any temporary political purpose. The majority of the court determined that the general control of this power should remain in the state, and that determination has been ratified and persisted in ever since by all who love the American government or governments as made by the fathers. If there is a disposition to depart from the strictness of Judge Miller's conservatism, and if in spite of this decision of the court and its success the trend of events has made of the Supreme Court the [1] "tribunal where all questions of individual liberty and property rights are now finally determined," it is because in the distinct grants of power, outside of the phrase "privileges or immunities of citizens of the United States," means have been found to curb in nearly all directions state legislation. The change in that respect has gone and is going quite rapidly enough. The discovery that on our leading railways the traffic that stops within the state of its starting is but a trifle in comparison with the total carriage shows how thoroughly we have become,

"for all the great purposes for which the federal government is formed, one people, all citizens of the United States."

It is to be said, too, that the extent of the transfer to the United States courts of the function of defending these individual rights has proved to be the measure of the extent to which that court has recognized the necessity of upholding the powers of the states. The Supreme Court, at all events, cannot be charged with forgetting the truth of Madison's [2] remark, that if the states were to be destroyed the general government would find it necessary to restore them. To be sure, it had an object-lesson as to this after the civil war.

[1] Guthrie's *14th Amdt., Preface*

[2] *Federalist*, No. 14, Lodge ed., 79.

We shall see in following the decisions of our federal Supreme Court in the exercise of its negative upon state legislation given it by the fourteenth amendment, that it has not been niggardly in allowing room for the police power. With the consciousness of unity and of common national interests ever growing stronger and at the same time with ever-increasing knowledge of the endless diversity of local requirements, it could not be otherwise. We shall find the authority of the states generally maintained where not palpably in violation of the inhibitions of the fourteenth amendment, and a considerable latitude of indulgence to what seem almost plain cases of pretense of police objects when the real purpose was the effecting of some discrimination against interests or persons.

The decisions of the states do not become unimportant. For one thing, if they hold a state law bad, the federal inhibition being only on states, there is no power of review, and the decision is final so far as that act is concerned.

Whatever trimming the state courts exercise upon the acts of their own legislatures remains lopped off. Of what is left, the federal Supreme Court takes cognizance if it is claimed to violate the provisions of the federal constitution. So, through the influence largely of the fourteenth amendment, partly also of the increasing importance of the commerce clause in the constitution as commerce more and more disregards state lines, the federal Supreme Court has become the final tribunal for this country where the claims of individual liberty and of property and commercial rights are heard.

Starting, as we have seen, with the Slaughter-house cases, the whole field of the police power, as it has been developed in the twenty-six years since by state legislation, has been reviewed. So the national struggle with slavery and sectionalism, that forced the term "police power" into general use, finally made of the federal Supreme Court, where it originated, the chief field for its exploitation. Truly, the "active life of the state is the law-making power." It is the glory of Judge Miller, as it was of Redfield and Shaw and Chief Justice Marshall before him, that he recognized clearly both the needs of such life in the way of fresh applications of law and the limits of such need.

CHAPTER VIII

The Police Power in the Federal Supreme Court.

Notwithstanding the new jurisdiction conferred by the fourteenth amendment, the next case in the federal Supreme Court on this subject, after the Slaughter-house cases, went back to the old contention between the police power and the interstate commerce clause. This was in [1] Railroad Company *vs.* Fuller. A statute of the state of Iowa required all railroads operating in that state annually in the month of September to fix rates of freight and fares for passengers and post them up on October 1 in each depot and station, and fixed a penalty for charging more than the rates so posted. An act of Congress of 1866 made all railroads carrying goods or passengers post roads and authorized them to do such business and receive pay for it. Fuller having shipped some freight from Chicago, Ill., to Marshalltown, Iowa, and being charged, as he asserted, a higher rate of freight than that posted, sued to recover back the difference.

The railroad among its defenses claimed that the Iowa statute was unconstitutional and an infringement of the exclusive power of Congress to regulate commerce between the states. The long warfare between the states and the railroads in the federal courts thus began, unless the case of the tax on railroad gross receipts, decided in 1872, be considered to have commenced it. The Supreme Court of the State of Iowa held the statute valid as a measure of police and legislation appropriate to the duties of common carriers. The railroad company seems to have based its claim to exemption from such act upon the fact that Congress had legislated on the subject as above indicated. Otherwise, they say, the act in question would be valid under the rule in the familiar cases of [2] *ex parte* McNiel, [3] Wilson *vs.* Blackbird Creek Marsh Company, and [4] Gilman *vs.* City of Philadelphia, and others.

Judge Swayne for the court held in this case, as in that of the

[1] *17 Wall*, 560 (1873).
[2] *13 Wall*, 236.
[3] *2 Pet.*, 245.
[4] *3 Wall*, 713.

pilot dues in *ex parte* McNiel, that the statute was a valid exercise of the police power of the state:

"It is not in the sense of the constitution in any wise a regulation of commerce. It is a police regulation, and as such forms a portion of the 'immense mass of legislation which embraces everything within the territory of the state and not surrendered to the general government,' all which can be most advantageously exercised by the states themselves."

He goes over the former cases that divides the power of our "complex" government into: 1st, Those of the states; 2d, those of the national government; 3d, the concurrent ones; and 4th, those which the states may exercise till Congress assumes them.

He includes transportation in commerce, and says:

"The authority to regulate commerce lodged by the constitution in Congress is in part within the last division of those powers."

In this way the regulation of interstate railways by state legislatures was distinctly countenanced and on the ground of a concurrent power, which must, however, always be called "police power" when exercised by the state, and "commercial power" or "power to regulate commerce" when employed by Congress.

In the same year of 1873 a controversy which we have seen passed upon by the states with somewhat varying results was brought by the fourteenth amendment into the federal Supreme Court, to remain there in some form even to this day—the dispute over prohibitory liquor laws.

In [1] Bartemeyer *vs.* Iowa the plaintiff had been acquitted before a justice of the peace in 1870 of selling intoxicating liquors. The state appealed the case, and in the circuit court the defendant admitted the sale, but said he had committed no crime, because he was owner of the liquor prior to the day when the act was adopted forbidding the sale, and was a citizen of the United States; and on this plea, without evidence and waiving a jury, the case was submitted to the court and he was found guilty and fined twenty dollars. The Supreme Court of Iowa affirmed the judgment, and the case was taken to Washington.

Judge Miller remarks in passing upon it that prior to the fourteenth amendment there would have been no federal question in it to bring before that court. It was presented as a violation of that amendment in depriving the plaintiff in error of privileges and im-

[1] *18 Wall*, 129 (1873).

munities of a citizen of the United States and of his property without due process of law. Judge Miller adheres to his views as to what are privileges and immunities of the United States citizenship expressed in the Slaughter-house cases. The other question, as to a deprivation of property by a too severe operation of prohibitory legislation upon existing articles, he declines to consider in connection with this case, as he finds that the preceding law of Iowa which the act in question superseded was almost if not quite as severe. He indicates, however, a disposition to follow Wynehamer *vs.* The People in that respect, citing that case with approval.

Judge Field and Judge Bradley each filed a concurring opinion distinguishing the case from the Slaughter-house cases. They take the opportunity once more to argue against the conclusion in the latter cases. They affirm that the claim that the Louisiana law was a police regulation was a mere pretext, and that its real object was to confer an unlawful special privilege, and once more that the granting of such a privilege would be a taking away of the privileges and immunities of citizens of the United States from those who suffered by it. The evident reluctance of the court to pass directly upon the question whether total prohibition would be a deprivation of property in existing liquors without due process of law could not fail to bring that question again before the court, and did not, as we shall see.

In 1874, too, the case of [1] Minor *vs.* Happersett, again involving the construction of the fourteenth amendment, was passed upon. Mrs. Virginia Minor, a free white citizen of Missouri, applied to Happersett, a registrar of voters in that state, to be allowed to register as a voter at the presidential election of 1872, and was refused. She brought suit against him for such refusal, and judgment on demurrer to her claim was given in favor of Happersett. This was affirmed by the Missouri court of last resort, and the case taken by her to the federal Supreme Court, as involving a denial of privileges and immunities of a citizen of the United States.

Chief Justice Chase argued from various statutes that it must be admitted that women were citizens and always had been, and if the right of suffrage was one of the privileges of a citizen of the United States, they must be allowed to have it under the fourteenth amendment. He declined, however, to admit this. He

[1] *21 Wall*, 162.

thinks the constitution leaves the qualification of electors to the states; that Congress had never attempted to act in the matter and the states had. He concludes that suffrage was not bestowed on women by the fourteenth amendment, and adopting the reasoning of Judge Miller in the Slaughter-house cases, from which he at the time dissented, he observes:

"The amendment did not add to the privileges and immunities of the citizen; it simply furnished an additional guarantee for such as he already had."

The fourteenth amendment had even before this been sought to be used in the case of [1] Bradwell *vs.* The State to confer on a woman the right to practice law in defiance of the state statute of Illinois.

In this year of 1874 came also the case of [2] Railroad Company *vs.* Maryland. In granting the franchise for constructing the branch of the Baltimore & Ohio Railroad from Baltimore to Washington the legislature authorized it to charge not more than $2.50 for passage the whole way, and shorter distances in proportion, with a requirement that one-fifth of the amount received for passenger fares should be paid to the state. This was claimed by the representatives of the road to be a tax on interstate travel. Probably the contention was not wholly in the interest of the traveler, and so the court viewed it.

Judge Bradley passing upon the case says:

"When the constitution was adopted transportation by land was wholly performed on common roads and in vehicles drawn by animal power. No one imagined at that day that the roads and bridges of the country, except when the latter crossed navigable streams, were not entirely subject to state regulation and control. They were all made either by the states or under their authority. The power of the state to impose or authorize such tolls as it saw fit was unquestioned. No one then supposed that the wagons of the country which were the vehicles of its commerce were subject to national regulation."

"The movements of persons and merchandise, so long as it was as free to one person as to another, to the citizens of other states as to the citizens of the state in which it was performed was not regarded as unconstitutionally restricted and trammeled by tolls exacted on bridges or turnpikes, whether belonging to the states or private persons; and when in process of time canals were constructed, no amount of tolls which were

[1] *16 Wall*, 130. [2] *21 Wall*, 470.

exacted thereon by the state or the companies that owned them was ever regarded as an infringement of the constitution. When constructed by the state itself they might be the source of revenue largely exceeding the outlay, without exciting even the question of constitutionality."

"So when, by the improvements and discoveries of mechanical science, railroads came to be built and furnished with all the apparatus of all-absorbing transportation, no one imagined that the state, if the owner of the works, might not exact any amount whatever of toll or fare for freight, or authorize its citizens or corporations, if owners, to do the same. Had the state built the road in question, it might to this day unchallenged and unchallengeable have charged $2.50 for carrying passengers between Baltimore and Washington. So might the railroad company under authority from the state if it saw fit do so. These are positions which must be conceded; no one has ever doubted them."

He finds thus an unlimited right of the state to charge or authorize others to charge for transportation from the simple fact that the railroads are its own work, or the work of others acting by its authority:

"It has discretion as to the amount of that compensation; that discretion is a legislative, a sovereign discretion, and in its very nature is unrestricted and uncontrolled."

From this first utterance of the court as to the state's rights over transportation rates, repeated several times in the course of the opinion, there was no dissent.

Judge Miller dissented briefly on the ground that the charge which the court was finding legal was a special exaction for the benefit of the state of Maryland for the privilege of bringing passengers to the national capital, a right which the constitution intended should be untrammeled in accordance with the principles announced by him in the case of [1]Crandall *vs.* Nevada. So to Judge Bradley's main position, thus strenuously declared in this first case involving the question, that the power of the state over rates of transportation within its boundaries was unlimited and sovereign, there was at this time no dissent.

Subsequently, as we shall see, this doctrine was greatly modified.

It may be noted that this whole question of rates of transportation was not brought into the state Supreme Court by the granger agitation, as is sometimes claimed and perhaps generally believed. This case of Railroad *vs.* Maryland and the preceding one of Rail-

[1] *6 Wall*, 35.

road Company *vs.* Fuller were in each case an attack upon a law of many years' standing and one making what the courts styled a "reasonable regulation." Judge Bradley held until his death to the position that the establishing of rates for railroad transportation was not a regulation of interstate commerce, even as applied to traffic going beyond the state, and that the amounts of such rates was a wholly legislative question with which courts had nothing to do. The maintenance of such a position together with the one that subsequently became established, that the roads must do business and accommodate the public or forfeit their franchises and have their lines condemned, seems very difficult, and Judge Bradley and those whom we shall find holding with him in this matter seem never to have offered any reconciliation of the two.

In 1875 the case of [1] Welton *vs.* State of Missouri raised the question of the validity of a statute which provided that any one selling or handling anything

"not the produce of this state, other than books, charts, maps and stationery,"

should be deemed a peddler and required to pay a license, no license being required of those selling produce of the state. A sewing-machine seller named Welton, whose machines were made outside of the state, was fined $50, and after his case had been affirmed by the state Supreme Court, appealed it to the one at Washington.

It was attempted to sustain the law by the argument that the state could tax its own citizens in any way it pleased, and could put aliens on an equality by a like tax on them. It was also claimed to be a mere regulating or police license on a special occupation. Judge Field in giving the opinion of the court declined to regard as serious the claim of police power. He regarded the law as simply an attempt to derive a revenue from foreign goods and quite unconstitutional.

[2] "It would be premature to state any rule, which would attempt to be universal in its application, to determine when the commercial power of the government of a commodity has ceased and the power of the state has commenced. It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character; that power protects

[1] *91 U. S.*, 275. [2] P. 282.

it even after it has entered the state from any burdens by reason of its foreign origin. The act of Missouri encroaches upon this power, and is therefore, in our judgment, unconstitutional and void."

During this year also, in the [1]United States *vs.* Reese, the court construed the fifteenth amendment and limited again the power of Congress to legislate in matters of police within the states. It held an act of Congress fixing a punishment for hindering or preventing voting, which was intended to enforce that amendment, unconstitutional, because the lawmakers had not distinguished between discrimination on account of race and discrimination for other reasons, and had assumed to act in reference to offenses against freedom of the national elections generally. Congress was held to have power under this amendment only to act with reference to race discriminations.

The decision is interesting as showing how slow the courts were to turn power over to Congress which had belonged to the states and how different the view of the effect of the constitutional amendments in the Supreme Court from that in the Congress where they originated. The dissenting opinions of Justices Clifford and Hunt are especially interesting as showing how easily the act could be so construed as to remove the objection; and, indeed, the decision is open to criticism as neglecting the general principle that laws are to be pronounced unconstitutional by the courts, after they have been duly adopted by the legislative body, only in plain cases.

Still in the same year, in [2]Henderson *vs.* Mayor of New York, the old question of the Passenger cases came up again; and to show how the amendments to the constitution were bringing back all the old questions with such new features as legal ingenuity could throw into them, the question now arose on an enactment of the state of New York dating as far back as 1849 and apparently passed to meet the objections to the law which was under consideration and held bad in the Passenger cases.

The law provided that every carrier of passengers should, for every one landed, either provide a bond in the sum of $300 to the state of New York against his becoming a public charge within four years or else commute such bond by a cash payment of $1.50, 50 cents to be for the benefit of other counties in the state, and the remainder to be expended by the commissioners of immigration for certain purposes in New York city.

[1] *92 U. S.*, 214 (1875).

[2] *92 U. S.*, 260 (1875).

New York *vs.* Miln and the Passenger cases are held to show that a state has police authority over incoming passengers, but the exaction of a sum of money as a condition of their entry is an invasion of federal authority. Judge Miller has no difficulty in concluding that the requirement of a bond for the support of the immigrant from a carrier is a mere pretext, when accompanied with the provision for a commutation at so trival a sum. The real purpose he finds is to exact the $1.50; under the decision in the Passenger cases it would be void, but he declines to rest on that judgment, given, as he says, by a bare majority of a divided court, and with much disagreement among the concurring majority as to the grounds of their action.

He thinks that the carrying of passengers is clearly commerce, both as defined in Gibbons *vs.* Ogden and as shown by the vast development of traffic since the date of that decision. He concludes that in view especially of the latter fact the subject of introducing alien passengers requires a uniform rule throughout the country, and therefore the control of that matter must be held to have been given to Congress. He declines to recognize any peculiar police power on the subject, and declares that nothing is gained by calling the power under which the act is passed by that name. He proceeds to show that very many statutes may be justified under any one of several so-called powers of the state, and that no matter to what power of a state its action may be referred, that action is void if it invade the domain of legislation belonging exclusively to the United States. Thus while throwing down the boundaries of any exclusive police power in the state, he, nevertheless, finds some "exclusive" powers in the United States.

The weakness of any theory of an essential difference in nature between the powers of government has seldom been so displayed as in the opinion of this case. He declines to say whether or how far a state may protect itself against actual pauperism, disease, and criminality among persons arriving from foreign countries. That there is any distinction in nature and essential quality between force of government applied to obtain from the master of a vessel $1.50 for each passenger and the same force applied to compel the same man to give information as to the number, character and former domicile of such passengers, would seem hard to establish.

Evidently the court that is applying such a distinction must, as Judge Miller says, "look to the effect of a statute for the test of its

constitutionality." That would seem to be equivalent to saying that the difference is not in the kind of power used but in the object to which it is applied and the purpose of its application. And the distinction between police power and taxing or commercial power has still to be maintained when the ostensible purpose of the collection of the $1.50 is merely to provide a guarantee fund against pauperism just as the requiring of the information is to guard against the same trouble.

The immediately following case of [1] Chy Lung *vs.* Freeman was found by Judge Miller to differ from the last one in only two important particulars. The plaintiff in error was a prisoner held in default of a bond of $500 to indemnify the counties and cities of California against liability for her support within two years, and the statute of California, unlike that of New York, did not require a bond for each passenger but only for certain specified classes of persons among whom were lewd women. To this class it was claimed the plaintiff belonged.

Judge Miller [2] again looks "to the effect of a statute for the test of its constitutionality." He finds that

"if citizens of our own government were treated by any foreign nation as subjects of the Emperor of China have been actually treated under this law, no administration could withstand the call for a demand on such government for redress; or if this plaintiff and her twenty companions had been subjects of Great Britain, can any one doubt that this matter would have been the subject of international inquiry, if not of a direct claim of redress? Upon whom would such a claim be made? Not upon the state of California, for by our constitution she can hold no exterior relations with other nations. It would be made upon the government of the United States. If that government should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer or all the Union? If we should conclude that a pecuniary indemnity was proper as a satisfaction for the injury, would California pay it to the federal government?" . . . . "The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress and not to the states. It has the power to regulate commerce with foreign nations. The responsibility for the character of the regulation and for the manner of their execution belongs solely to the national government."

He does not deny a right of the state to protect itself, "in the

[1] *92 U. S.*, 276 (1875). [2] P. 279.

absence of legislation by Congress on the subject," against pauperism and criminality from abroad.

"Such a right can only arise from a vital necessity for its exercise and cannot be carried beyond the scope of that necessity. When a state statute limited to provisions necessary and appropriate to that subject alone shall in a proper controversy come before us, it will be time enough to decide that question."

He finds the California statute, in the stretch of authority given to the commissioner of immigration and in its requirement of a bond or a money commutation, unnecessary, undesirable, and therefore unconstitutional.

Here we have the power to regulate foreign commerce and the foreign relations of the Union coming in collision with an attempt of California to regulate the admission of undesirable persons. The court finds (1) that the national authority is paramount; then it finds that such authority is exclusive; then it admits that there might an emergency arise which would warrant the state in taking action affecting these subjects, but finds that the action of the state in this instance is not of a kind "necessary or proper for this purpose," and the action of the state court is reversed and the law wiped out. It cannot be denied that as Judge Miller says, both in this case and in that of Henderson *vs.* New York, that the same act may often be equally well attributed to any of several powers of government. This, however, seems not to discourage continual efforts to draw important consequences from a supposed distinction between the essential natures of such powers.

In this same year, 1875, the well-known case of [1] United States *vs.* Cruikshank served, like that of United States *vs.* Reese, at once to emphasize the doctrines of the Slaughter-house cases and to indicate how far those cases were from answering the expectations of those who framed the fourteenth amendment and the legislation connected with it, the civil rights and enforcement acts.

The defendants were charged in thirty-two counts with conspiracy under the sixth section of the enforcement act: (1) Banding together to intimidate two citizens of the United States persons of color with intent

"to hinder and prevent them in their exercise and enjoyment of their lawful right and privilege to peaceably assemble with each other and other citizens of the United States for a peaceful and lawful purpose;"

[1] *92 U. S.*, 542.

(2) to prevent the same persons bearing arms; (3) to deprive such persons of their liberty without due process of law; (4) to deprive them of the equal benefit of all laws and proceedings for the security of persons and property of white citizens; (5) to deprive them of privileges and immunities secured to them as citizens of the United States and of Louisiana on account of their color; (6) to hinder and prevent their enjoyment of the right of suffrage; (7) to put in great fear and oppress such persons for having exercised the right of suffrage, and (8) to prevent and hinder such persons in the exercise and enjoyment of all the several rights and privileges guaranteed them by the institutions and laws of the United States.

Then there were eight counts that charged them with combining, conspiring and confederating, instead of banding together as in the first eight; then there were sixteen counts charging similar offenses in other forms. Three defendants were found guilty under these first sixteen counts and not guilty under the other sixteen. They moved for an arrest of judgment on the ground of the unconstitutionality of the statutes on which the indictment was based and the insufficiency of the indictment itself. There was a disagreement of the judges of the Circuit Court, the presiding judge being of the opinion that judgment should be arrested, and on a certificate of such division of opinion the case came up for hearing in the Supreme Court.

The section of the statute on which the prosecution was based provided that if two or more persons should "band or conspire" together, or go on the highway or the premises of another, with intent to violate the act or to oppress or intimidate any citizen so as to prevent or hinder his free exercise or enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States, or do the same because of his having exercised such right, such persons should be guilty of felony and be fined not to exceed $5000, or imprisoned not longer than ten years, or both, and be ineligible to any office under the federal government.

Chief Justice Waite in deciding the case says:

"To bring this case under the operation of the statute, it must appear that the right, the enjoyment of which the conspirators sought to prevent, was granted or secured by the laws of the constitution of the United States. If it does not so appear the criminal matter charged has not been made indictable by any act of Congress."

He proceeds to say that there is a United States government and there are state governments; that each one is distinct and has citizens of its own; that the same person may be a citizen of the United States and of a state, but his rights under each will be distinct.

"The people resident within any state are subject to two governments, one state and the other national, but there need be no conflict between the two. The powers which one possesses the other does not. They are established for different purposes and have separate jurisdictions. Together they make one whole and furnish the people of the United States with complete government, ample for the protection of all their rights at home and abroad."

He admits that the same person may be amenable to both for the same act, and instances a resistance to a United States officer as violating at once the peace of the state and the national law, and a counterfeiting of United States coin and passing it as exposing the counterfeiter to a penalty under United States law and to prosecution for fraud within a state.

"This does not, however, necessarily imply that the two governments possess powers in common or bring them into conflict with each other."

He goes again over the ancient ground of nothing belonging to the national government except powers granted by the constitution and that everything not so granted is left to state protection. The right to assemble peaceably is found to depend upon state protection, so the first and ninth counts of the indictment go out. The right to bear arms is indeed guaranteed against infringement in the second amendment to the federal constitution, but the amendment only restricted federal powers and did not affect the states, and as against a state or its citizens this right has no guarantee in the federal constitution, and so the second and tenth counts were dismissed.

The third and eleventh counts for conspiring to deprive citizens of life and liberty without due process of law are held equally bad. The fourteenth amendment, to be sure, says that no state shall make or enforce a law doing this, but the duty of protecting citizen against citizen within a state rests with the state. The same is true as to the equal protection of the law, of which an intent to deprive is charged in the fourth and twelfth counts. The constitutional prohibition lies only against state action in that direction.

The sixth and fourteenth counts as to conspiring to prevent enjoyment of the right of suffrage are held bad because the constitution confers no right of suffrage as has been seen in the case of Minor *vs.* Happersett; it only guarantees against discrimination on account of color or previous servitude, and this is not alleged in the counts. The seventh and fifteenth counts are held no better for they merely allege the putting in fear and oppression of the same persons on account of having exercised the right to vote and without stating facts of race discrimination to bring the case within the terms of the constitution.

There remained the fifth and thirteenth, the eighth and sixteenth counts under which also the defendants had been found guilty. The fifth and thirteenth alleged a conspiracy on account of their African race and color to deprive the persons named of their several rights and privileges and immunities granted and secured to them by the constitution of the United States as citizens of the country and of the state of Louisiana. The eighth and sixteenth embraced substantially the same thing without the clause as to African descent and race and color. These counts are held to be too vague to inform the court or the accused what specific rights were claimed to be invaded, or by what specific acts the invasion was accomplished, and from them it could not be determined whether or not there had been a specific violation of law in any constitutional particular. The judgment was therefore arrested and the defendants discharged.

The concurring opinion of Judge Clifford agrees in the conclusion but would rest it upon other defects in the indictment, and more particularly upon its indefiniteness. His view of the constitution and of the privileges or immunities of a citizen of the United States guaranteed by it apparently does not differ materially from that announced by the court through Chief Justice Waite. These decisions together with the Slaughter-house cases have been sometimes called reactionary decisions of the court, and have sometimes been thought, as was charged at the time, to have thrown away the results of the war; that they prevented at least some of the results of the constitutional amendments which were confidently expected by the Congresses which proposed them and which passed the civil rights and enforcement acts is plain. Practically all the legislation of Congress on the subject was thwarted by the narrow construction of the amendments adhered to by the court.

That the construction of the court was that of the people at large

is shown by the fact that no new attempts were made toward the adoption of amendments that should give positive as well as negative power to the general government over matters of local police. The conclusions of the court in that respect were never changed, though, as was to be expected, when the court finally came to decide upon what is in the amendments, rather than what is not, more was found in them than their supporters in the first disappointment thought was left after these decisions. The court, after first holding that the amendments had caused no sweeping change in the relations of the state and federal governments, proceeded to develop the meaning of them with results that we shall presently see.

CHAPTER IX.

Regulating the Use of Property Not a Forbidden Taking.

The principles suggested by the cases of Railroad Company *vs.* Fuller and Railroad Company *vs.* Maryland were now to be extended preparatory to a later abridgment. [1] In Munn *vs.* Illinois began another judicial contest inside the federal Supreme Court, this time over the employment of the police power of the state to regulate charges in "employments charged with a public interest." The doctrines of Railroad Company *vs.* Fuller and Railroad Company *vs.* Maryland, when they commenced to be extended and their consequences perceived, began at once to be questioned by members of the court, although there had been no dissent in either of those cases.

The State of Illinois has a constitution expressly declaring all elevators and storehouses where grain is stored for a compensation public warehouses, and requiring the legislature to pass laws for the inspection of grain for the protection of producers, receivers and shippers of grain and produce. In 1871 a law was enacted to carry this constitutional provision into effect. This law among other things required the proprietor of every such public warehouse to obtain a license and provided a penalty of $100 for each day's business done without a license. It was also provided that no such public warehouse should charge for the storage of grain more than a certain fixed price.

In 1872 an action was commenced against Munn & Scott, of Chicago, the managers of a large elevator there, charging that they unlawfully transacted such business without procuring the license required. It was agreed at the trial that Munn & Scott had complied with the law in every respect but two: that they had taken out no license and given no bond, as was required, and that they had also continued to charge rates of storage in use before the law was adopted and greater than the ones fixed by the law. They were found guilty and fined. This judgment was affirmed by the

[1] *94 U. S.*, 113 (1876).

Supreme Court of the state, and the defendants took the case by error to the Supreme Court of the United States.

They asserted that so much of the statute as attempted to require the obtaining of license and giving of bond, and to fix a fine if this were not done, and to establish maximum rates of storage was unconstitutional and void; that they were an infringement of sections 8 and 9 of article 1 of the federal constitution giving Congress the power to regulate commerce between the states and requiring that no preference be given to the ports of any state, the elevator being confessedly an instrument of interstate commerce. It was also claimed that the fourteenth amendment, in declaring that no one should be deprived of property without due process of law, prevented any such reduction by statute of rates of storage which the elevator had collected for many years.

In opposition to this assertion of rights in the elevator company the police power of the state was invoked, and all the cases before mentioned in this discussion cited and a great many more. The question considered by the court is stated by Chief Justice Waite in the following terms:

[1] "The question to be determined is whether the general assembly of Illinois can, under the limitations upon the legislative power of the states imposed by the constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago, and other places in the state having not less than 100,000 inhabitants, in which grain is stored in bulk and the grain of different owners mixed together in such a manner that the identity of different lots cannot be preserved."

He considers, first, the objection that the law is a violation of the fourteenth amendment, and as this provision, while new in the constitution of the United States is as old as Magna Charta and has formed a part of every state constitution adopted in America, he finds plenty of precedents as to its application. He declares the state legislatures now possess all the supremacy of the Parliament of Great Britain, except so far as they are limited by having granted out of such supremacy the power held by the federal government, and so far as certain powers are, by the terms of the state constitutions, retained by the people. He has no difficulty in showing that the power to regulate charges for various quasi-public employments has always been asserted by both English and Ameri-

[1] *94 U. S.*, 123.

can governments and that such regulations had never been deemed a deprivation of the property involved within the meaning of this provision of Magna Charta and of the state constitutions.

The claim that the owner is entitled to a reasonable compensation for the use of his property, and that the question of what is a reasonable return is a judicial and not a legislative question, is met by an appeal to precedent again; and again it is answered that it had been uniformly treated as belonging to the legislature. The chief justice admits that the power is liable to abuse, but declares the remedy for such abuse must be sought at the polls and not in the courts.

The claim that the legislation was an infringement on the power of Congress to regulate interstate and foreign commerce is disposed of by saying that the elevator was not exclusively an instrument of such commerce; that it must be considered as subject to the local government in whose jurisdiction it stood; and, unless the requirements of such local government clashed with congressional legislation as to commerce, any such requirements made in good faith, in exercise of the proper powers of local government, must be upheld, even though they indirectly affected interstate and foreign commerce.

Justices Field and Strong dissented. They thought the business of storing grain a purely private one. As Judge Field says in the opinion:

"The public are interested only as they are interested in the storage of other products of the soil or of manufacture."

They thought the doctrine of the court might fairly be construed to mean that whenever a business was useful and therefore important to the public its compensation could be regulated:

"The doctrine of the state court, that no one is deprived of his property within the meaning of the constitutional inhibition so long as he retains its title and possession, and the doctrine of this court, that whenever one's property is used in such a manner as to affect the public at large it becomes by that fact clothed with a public interest and ceases to be *juris privati* only, appear to me to destroy for all useful purposes the efficacy of the constitutional guaranty."

Perhaps, in all the decisions which have been rendered upon this subject, the nature of the contest between the police power and the terms of the constitutions has never been brought out more

distinctly than in these two opinions. It would be hard to find any place where it is more distinctly to be seen that the real question is whether the actual guarantees for the enjoyment of individual and property rights and the limits to such enjoyment shall be sought in common-law precedents or shall be found in the terms of our written constitutions.

It is to be said that in finding judicial decisions to support their assertion that to impair the use of property is to deprive the owner of it the dissenting judges were not very successful. The truth is, as Mr. Sedgwick quite clearly pointed out in his work on [1] *The Construction of Statutory and Constitutional Law* in 1857, interferences with the use of property for reasons of police have not been held to be a taking, nor to be subject to the inhibition of Magna Charta or that of state constitutions. Nor are they very fortunate in trying to establish a distinction between the effects of this law and others, as, for instance, usury laws. They found themselves compelled to resort to what they themselves, as judges, would unsparingly condemn in advocates. They make use of the general expressions in favor of the sacredness of property and personal rights to be found employed by the courts in the discussion of cases of a quite different character from that they had under consideration.

The real distinction, more or less consciously underlying all the precedents, that legislation of this character is to be deemed good and constitutional if it is a real exercise of a true function of the state in providing for the general welfare and in guarding against a real overcharging of those who are not in a position to protect themselves, and is void if merely a more or less complete confiscation, seeking to disguise itself as such regulation, did not yet clearly develop itself.

The next case, the [2] Chicago, Burlington & Quincy Railroad Co. *vs.* Iowa, passed upon at the same session in an opinion also by Chief Justice Waite, applies the same reasoning in all respects and very briefly to the Iowa law establishing maximum rates of charge for transporting passengers and freight.

This law, also, was resisted as being an impairment of the contract in the charter of the road as well as for all the reasons urged in Munn *vs.* Illinois.

[1] P. 435, Pomeroy's ed.

[2] *94 U. S.*, 155.

The objection that the law infringed upon the power of Congress over interstate commerce was especially urged. The chief justice found no difficulty with the charter provision. No immunity from such legislation was expressly given, and it could not be, constructively. The claim that the company was deprived of property without due process of law and that the legislation infringes on the exclusive domain of Congress, inasmuch as the railroad was an instrument of interstate commerce, was set aside for the same reasons as in the preceding case :

"This road, like the warehouse in that case, is situated within the limits of a single state. Its business is carried on there and its regulation a matter of domestic concern. It is employed in state as well as interstate commerce, and, till Congress acts, the state must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without may be indirectly affected."

Judges Field and Strong again dissented, but gave no opinion.

The third of the Granger cases at this term was [1] Peck *vs.* The Chicago & Northwestern Railway Co. This case held that the doctrine of the former two and the statutes of Wisconsin fixing the rates of transportation must apply to the railway company, although it was formed out of the consolidation of certain Wisconsin, railroad corporations with Illinois corporations, on the terms of compliance with Wisconsin laws when operating in Wisconsin. It was held that this fact of consolidation with a corporation of another state could not deprive the state of its right of control.

In the case of the [2] Winona & St. Peter Railroad Co. *vs.* Blake it was held that the company having accepted its incorporation as a common carrier was bound to carry freight when offered for the lawful compensation fixed by the state. In [3] Chicago, Milwaukee & St. Paul Railroad Co. *vs.* Ackley it was held that the company could not recover more than the maximun rate allowed by statute, even upon showing that such additional charge was reasonable and inherently just.

In [4] Stone *vs.* Wisconsin a judgment of the state court that the provisions of the state constitution of 1848 under which Wisconsin was admitted to the Union, that

[1] *94 U. S.*, 164 (1876).
[2] *Id.*, 180 (1876).
[3] *94 U. S.*, 179.
[4] *Id.*, 181 (1876).

"all laws creating corportations may be altered or repealed by the legislature at any time after their passage,"

applied to a statute passed before such constitution, but whose provisions were not accepted until after such passage was affirmed.

This was the last of these Granger cases and Judge Field, with whom concurred Judge Strong, filed a dissenting opinion, that by the result of these cases the railroad companies were "practically placed at the mercy of the legislature of every state." They argued against the result as destroying the value of bonds and mortgages and impairing the obligations of contract, but again without suggesting the true limit between spoliation and regulation. In fact, no question of such distinction was raised in these cases. The plaintiff roads were resisting all regulation of rates.

That much of the alarm of corporate capital at this extension or, at least, assertion of police power in the states, was due to these dissenting opinions, which, be it remarked, found no fault with the justice of the result reached in these individual instances, seems clear. In truth, the cases were not instances of oppression appealed against by the roads. It is impossible not to recognize at once, in their varied character, in the different roads involved, the questions raised and the manner of objections, that they were brought by the great lines of the Northwest under a more or less conscious prearrangement, not by way of resisting actual oppression, but to procure from the Supreme Court of the United States an expression limiting the powers of the state legislatures and setting these great interests substantially above such powers.

Actual hardship was in no case seriously attempted to be shown. It appears clearly enough that to be required to show any hardship was deemed a most serious one by the corporate interests involved. That the court under such circumstances asserted in emphatic terms the authority of the legislature was a great public service. If it did so somewhat too strongly it is to be remembered that the time to assert limiting doctrines is when the legislative authority has been established and is really abused or threatened to be.

The following year, in [1] Shields *vs.* Ohio, the right of the state to prescribe a maximum rate came again before the court under a slightly different phase. Two companies had consolidated, one of which by its charter was exempt from such legislation, and one not.

[1] *95 U. S.*, 319 (1877).

The question was whether the consolidated company was subject to such requirements. The controversy arose upon that part of the line which by the terms of the original charter was not subject to such legislation; the court held, however, that the consolidation created a new corporation subject to such legislation as the constitution of the state at the time of the consolidation permitted it. Justices Field and Strong again dissented on the general ground that the state legislature had no authority to prescribe maximum rates to the company while continuing its existence and management of the line agreed in the original charter not to be subject to such action.

Another railroad case in this year, 1877, is of special interest because of the change that the court found itself compelled to make a few years later in its rulings on the same subject. One [1] Husen brought suit against the Hannibal & St. Joseph R. R. Co. for damages alleged to have been incurred because of the violation by the company of an act of the Missouri legislature in relation to "Texas, Mexican or Indian cattle." The law in question provided that between March 1 and November 1 of each year no such cattle could be brought into or remain in the state, unless kept the entire previous winter in the state. They might be taken through the state on cars or boats, but the transportation companies should be liable for all damages resulting from Spanish or Texas fever along the line of transportation and the existence of the disease along such route should be *prima facie* evidence that it came from such transportation.

At the trial it was objected that the act was in violation of the constitution and an attempt by a state to regulate interstate commerce. It was earnestly argued and the numerous holdings as to quarantine powers and the right to prohibit the carrying of detrimental articles all cited. Judge Strong, however, in passing on the case found only the question raised whether the act was a regulation of commerce and so void as infringing upon the powers of Congress under the constitution. He found that the statute, since it absolutely prevented the importation of healthy cattle during two-thirds of the year, put a burden upon such cattle when merely carried through the state and must be regarded as a regulation of commerce, unless it could be justified as a measure of police.

[1] *95 U. S.*, 465.

Citing the cases of [1] Henderson *vs.* Mayor and [2] Chy Lung *vs.* Freeman, he says that in the first a statute which was sought to be justified as a measure to prevent the introduction of paupers and in the second one that pretended to exclude lewd women were each held bad, because they were applied to all passengers indiscriminately and were manifestly intended to be a tax on such commerce and their police character was a mere pretext. He cites the cases holding that such a statute is a police regulation and which refused to inquire whether it does not go beyond legitimate police action, but declares that question is not one for the legislature only:

"The police power of the state cannot obstruct foreign commerce, or interstate commerce, beyond the necessity of its exercise."

Under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the federal constitution.

The trouble with this determination was eventually found to consist in the fact that the law was a genuine application of the police power. The cattle in question, it has now long been known, even if themselves healthy, are liable during the warm months to communicate the fever to native cattle. The statute was not, in fact, as Judge Strong wrongly concludes, the result of commercial jealousy and an effort to give an advantage to the Missouri cattle raiser. It is noteworthy in this case, which had ultimately to be practically abandoned, though not formally overruled, that the relation between the powers of the state and the federal constitutions are much more accurately set forth than in the Granger cases. An examination of the decision makes the reason clear. The police power and the commerce clause had been disputing for half a century. The fourteenth amendment was a new antagonist. Chief Justice Waite in deciding the Granger cases could not pick out his principles from preceding ones, as Judge Strong, in passing upon this one of Railroad Company *vs.* Husen, could take his from all the long line of precedents in the federal court.

The police power and the commerce clause of the federal constitution collided again in [3] Hall *vs.* DeCuir in this year of 1877. The legislature of Louisiana had enacted that no one be refused admission to public conveyances or expelled from them by reason of discriminations on account of race or color, or for any reason except failure to pay fare, bad character or bad conduct in certain

[1] *92 U. S.*, 259. [2] *Id.*, 275. [3] *95 U. S.*, 485 (1877).

particulars, and that any one so refused, expelled or discriminated against might recover exemplary damages of the offending party.

Benson, the owner of a steamboat plying between New Orleans and Vicksburg, took on board at the former city Mrs. DeCuir to convey her to Hermitage, Louisiana, and because he refused her the privilege of the cabin reserved for white ladies she sued and recovered a thousand dollars. Benson insisted that he was engaged in interstate commerce and that the act of the Louisiana legislature could not affect him. After his death his administrator appealed the case to the Supreme Court of Louisiana, and when the judgment was there affirmed took it to Washington.

Chief Justice Waite gave the opinion:

"There can be no doubt but that the exclusive power has been conferred upon Congress in respect to the regulation of commerce among the several states. The difficulty has never been as to the existence of the power, but as to what is to be deemed an encroachment upon it, for, as has been often said, legislation may, in a great variety of ways, affect commerce without being a regulation of it within the meaning of the constitution. It would be useless to undertake to fix an arbitrary rule by which a line must in all cases be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved."

This seems very like saying that the power of Congress is exclusive, but nobody has ever been able to find out just what it excludes. The chief justice adds:

"But we think it may be safely said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration in our opinion occupies that position. It does not act upon business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into or goes out from within."

Attention is called to the fact that the Mississippi river borders upon ten states and is a highway for them all, and the conclusion is reached that its commerce must be kept free of such local legislation. Judge Clifford, in a concurrent opinion holding that the power of Congress is exclusive and the states have no authority unless the nature of the subject or the terms of congressional legislation leave something to them, once more contributes to the endless discussion of the relations between the cases of Gibbons *vs.* Ogden

and Wilson *vs.* Blackbird Creek Marsh Company. He finally reaches the conclusion that Judge Marshall saw no opposition between the two and that the latter case was considered by him to be so remotely connected with commerce that the state's local legislation under consideration in it was wholly within the police power of the state.

As to this, it may be said that the most careful reading of Blackbird Creek Marsh Company case will fail to show that any such sharp distinction between commercial and police powers was in the mind of Chief Justice Marshall. That he did not regard the two cases as conflicting seems certain. That he had expressly declined to decide in the first that the unexerted power of Congress is exclusive of that of the state would seem reason enough for his so thinking.

In this same year of 1877, in the case of [1]Pensacola Telegraph Company *vs.* The Western Union Telegraph Company, it was decided that while ordinarily corporations might be excluded at will from a state, as the previous cases of [2]Paul *vs.* Virginia and [3]Bank of Augusta *vs.* Earl had determined, yet telegraph companies were by act of Congress permitted to set up lines along all post roads and all railway lines were post roads, therefore the Western Union Telegraph Company could lay its lines along a Florida railway, even where a Florida company had from the state an exclusive franchise to do so. Judge Field filed an energetic dissenting opinion from this decision and its plain consequences, viz., that Congress could legislate any kind of a transportation company into any state in defiance of its laws. But from this time the doctrine that transportation agencies authorized by Congress may not be excluded from a state by its legislature was firmly established.

At this term of the Supreme Court the case of [4]Railroad Company *vs.* Richmond held in terms that

"appropriate regulation of the use of property is not taking it within the meaning of the constitutional prohibition."

The Richmond, Fredericksburg & Potomac R. R. Co., incorporated in 1834, had been then authorized to place on its road all machines, vehicles, carriages, wagons and teams necessary or proper for transportation, and required to furnish transportation for per-

[1] *96 U. S.*, 1.
[2] *8 Wall*, 168.
[3] *13 Pet.*, 519.
[4] *96 U. S.*, 529.

sons and property at rates allowed by the charter. It was admitted into the city of Richmond by special resolution of the city board authorizing its location on certain lines.

When first commencing operation the railroad company was involved in a controversy with the city authorities as to the drawing of trains with steam power through the city and across Broad street to depot and grounds across such street, but was permitted to do so. In 1874 an ordinance of the city was passed forbidding to the company any use of locomotives on a certain portion of their track across and east of Broad street, and providing a penalty of $100 to $500 for violation of the ordinance. Upon judgment for the penalty being rendered in the state courts the matter was taken to the federal Supreme Court and the action upheld.

"All property within the city is held subject to the legitimate control of the government, unless prohibited by contract rights, which is not the case here. Appropriate regulation of the use of property is not taking it within the meaning of the constitutional prohibition."

It is also held that as the plaintiff railroad company alone had authority to run cars across Broad street, the fact that it alone was forbidden by the ordinance from using steam power for such purpose would not make the ordinance a denial to the company of equal protection of the laws.

At this same session of 1877, the case of [1]*ex parte* Jackson was decided. The petitioner for writ of habeas corpus and certiorari, Jackson, had been convicted of sending through the mails a circular advertising a lottery, in violation of a statute of the United States providing that lottery advertisements should not be sent through the mails, and that one who would knowingly send them with intent to defraud should be fined. He claimed that the statute was unconstitutional and not warranted by any power in Congress, that it was only competent for Congress to make necessary arrangement for the management of the post roads in the carriage of the mails, and that the protection of the people from fraud was no part of its jurisdiction.

The court carefully guards the constitutional rights of citizens to be exempt from unreasonable searches and seizures, and affirms that this provision extends to protection of sealed matters in the mails. But it is declared to be in the power of Congress to say

[1] *96 U. S.*, 727.

what shall be carried and how, and to provide a punishment for attempting to use the mails unlawfully. The court thought the freedom of the press sufficiently vindicated by asserting that Congress had no power at the same time to refuse to carry by mail printed matter and to forbid its diffusion by other means. So it was held that the conviction was warranted. Congress could not authorize an inspection of sealed matters except upon a warrant duly issued for such purpose, but it might forbid the transportation of obscene or fraudulent matters, and if they were unsealed could ascertain their character by the inspection of the postal officers and employés.

The old dispute between President Jackson and Senator Calhoun over the former's [1] proposition to exclude anti-slavery publications from the mails in slave states, and the conclusion that Congress had no such power, was brought forth to aid the petitioner. The court says, however, that the conclusion then reached rested upon an assumption that if Congress had such power, it had also the power to forbid the circulation of printed matter in the states by other means than the mails, at least over postal roads, and all roads, waterways and railroads might be declared postal roads, and Congress thus be invested with authority to prohibit absolutely the circulation of anything of which it might disapprove. This assumption the court denies and, therefore, the conclusion from it—that all such laws were invalid.

The idea often propounded, and which derives support from expressions of the federal Supreme Court, to the effect that the police power is exclusive and belongs to the state, and that no such power pertains in any degree to the federal government, could not well get a harder blow than this decision. Evidently the court concluded that the only distinction between powers of government is in the subjects to which they were applied, and consequent variations of the manner of exercising them. The use of the power to establish post offices and post roads, incidentally to protect the people of the states from lottery enticements, would seem to show conclusively enough the difficulty in finding any other ground of distinction between powers. Perhaps the same thing will appear a little more plainly in the Debs case.

In this year of 1877, too, the principles of [2] Bartemeyer *vs.* Iowa were reaffirmed in briefer terms and without the cautious limita-

[1] Annual Message 1835, *Messages, etc., of Presidents*, Vol. iii, p. 175.
[2] *18 Wall*, 129.

tions as to the effect of prohibitory laws upon property already in existence. In case of [1] Beer Co. *vs.* Massachusetts the plaintiff did not attempt to change the ruling in the Iowa case, but only to distinguish from it. The plaintiff had been chartered as a brewing company in 1828 by the state of Massachusetts. That state had passed a prohibitory liquor law substantially like the one examined in the Iowa case. The Beer Company claimed that the state had no power to practically destroy its franchise by forbidding absolutely the sale of its products in Massachusetts.

It was held, in the first place, that the state of Massachusetts having reserved the right to change or repeal the company's charter, the exercise of that right even to the extent of forbidding the sale of the company's products was no violation or impairment of the obligation of any contract. It was further held that such reservation was unnecessary. On the authority of Boyd *vs.* Alabama, *94 U. S.*, 645, it was declared that forbidding the sale of intoxicating liquors was such a police act as no legislature could sell or bargain away the right to do, and that such a law does not in itself in the case under consideration violate any provision of the constitution of the United States, neither fourteenth amendment nor commerce clause. Evidently appropriate legislative action as to the use of property is not a taking.

[1] *97 U. S.*, 25.

CHAPTER X.

Development of the Fourteenth Amendment.

Among the early cases decided in 1878 was [1] Cook *vs.* Pennsylvania. A statute of that state passed in 1853 and modified in 1859 required every auctioneer to pay into the state treasury a percentage on all his sales. Seven hundred and fifty-seven and 83-100 dollars was claimed of Cook on certain foreign merchandise sold by him in the original packages. He declined to pay; and the federal court said he need not, that the law was so far a state tax on imports as to be void and would not be justified as either a police regulation or the sale of a state franchise. This seems to us so inevitable a conclusion that the fact of the law remaining unchallenged for a quarter of a century shows the slowness of perception of the federal constitution's effect on the states.

In the same year the federal court touched the police power in [2] Fertilizing Co. *vs.* Hyde Park, this time by way of a modification of the Dartmouth College case. The legislature of Illinois had granted the plaintiff company a charter to locate its chemical works and carry on for fifty years the business of converting offal from the Chicago slaughter-houses and from dead animals into fertilizers in Cook county and south of the dividing line of townships 37 and 38. They so located their plant, and bought land which afterwards came within the village of Hyde Park. The people found their business a nuisance An ordinance of the village forbade the carrying of such material or products through its streets or on the railroads through it. The company sought to enjoin the execution of the ordinance. The state courts refused to do so. It took the case to the federal Supreme Court, asserting that its charter was a contract and the ordinance a violation of it.

The majority of the court held, in the first place, that there was no express contract providing in terms that the village of Hyde Park should not interfere with them, and, in the second place, that if there had been, it would probably be void as an unauthorized

[1] *97 U. S.*, 566. [2] *Id.*, 659.

limitation of the police power, citing [1] Beer Co. *vs.* Massachusetts. Justice Miller concurred for the former reason, and because he thought the ordinance left the company room enough still to carry out the terms of the charter outside of the village and within the boundaries fixed by law. Justice Strong dissented altogether. He shows, as it would seem unanswerably, that the company was authorized by the state to carry on its business at *any* point south of a certain line in Cook county for fifty years; that it had its business located and its arrangements made under this franchise, and to carry on this business it was necessary to do things which the ordinance forbade. He thought the state could not authorize its municipality to prevent the very thing which the state itself had agreed to permit, without impairing the obligation of the contract in the charter. He repudiated the second ground of the decision in Beer Co. *vs.* Massachusetts, and was for applying undiluted the doctrine of the Dartmouth College case.

He seems to have stood alone among the judges. The case has been and is upheld, but it can only be upon the ground that the Dartmouth College case is modified to the extent that a charter is never to be construed to grant away the police power of the state enacting it. While the police power still remains as indefinite a term as the courts have heretofore made it, it is evident that a large portion of the Dartmouth College case is shorn away.

In the case of [2] Transportation Co. *vs.* Chicago the court again touched upon that burning question in the Granger cases, whether action of the state affecting the use of property was to be considered a deprivation of it, and again were constrained to deny such conclusions. The city had built a tunnel under the Chicago river, and in doing so, the Transportation Company claimed, had weakened the support for the walls of the latter's buildings. It also claimed that by reason of a coffer-dam in the river, built to aid the excavation of the tunnel, access to the company's dock had been impeded.

The court finds no ground of complaint on either account; both street and river are declared to be public highways and under the jurisdiction of the city. If, without actually invading the Transportation Company's lots the city impaired the company's use of its property, no cause of action arose.

[1] *97 U. S.*, 25.

[2] *99 U. S.*, 635 (1878).

In the year 1879, in [1] Tennessee *vs.* Davis, the right to remove a criminal case from state to United States courts when defense of acting under federal law is set up was passed upon. James M. Davis, a deputy revenue collector of the United States, was indicted for murder in Grundy county, Tennessee. He applied to the Circuit Court of the United States for that district to remove his case into that court, on the ground that the act of shooting for which he was indicted was in necessary self-defense while he was in the official service of the United States.

The judges of the Circuit Court disagreed as to whether such an indictment was removable under section 643 of the United States revised statutes, and whether, if removable, there was any procedure for trial of it, and whether such a trial of the indictment could be had in that court. The Supreme Court, in an opinion by Justice Strong, answers all three questions in the affirmative.

They find the statute provides for removal of the case; that the general procedure of the Circuit Court is adequate to its trial. The existence of this power is affirmed on the ground of its necessity in order that state action may not paralyze the federal government. Justice Clifford, with whom concurred Justice Field, dissented in a careful opinion, whose main position was that jurisdiction had been given to United States courts by the constitution only over offenses against the United States authority. The right of removal in this case was asserted because of the claim that the defendant's action was justified by United States law and his duty as an officer. The authority to take the prosecution of an offense which was solely against the laws of a state out of the hands of that state and its courts was earnestly opposed.

Justices Clifford and Field return almost to Taney's definition of the police power:

"State police, in its widest sense, comprehends the whole system of internal regulation by which the state seeks not only to preserve the public order and to prevent offenses against her authority, but also to establish for the intercourse of one citizen with another those rules of justice, morality and good conduct which are calculated to prevent a conflict of interests and to insure to every one the uninterrupted enjoyment of his own as far as is reasonably consistent with a like enjoyment of equal rights by others."

[1] *100 U. S.*, 257 (1879).

Judge Chase's holding in [1] The United States *vs.* DeWitt, that Congress has no authority of this kind within a state, is cited.

Nevertheless, the decision stands, and its authority is no longer questioned. We shall even see it extended in [2] Davis *vs.* South Carolina. The right to such a removal is to-day unchallenged, showing once more how impossible is the putting of any but practical limits to the extent of authority. No theoretical conclusions as so the nature of police powers or their exclusive inherence in the states can maintain themselves against the practical needs and actual power of the general government.

In the succeeding cases of the same year, [3] Strauder *vs.* West Virginia, [4] Virginia *vs.* Rives, and [5] *ex parte* Virginia, the fourteenth amendment and the negro problem, and the relations of both to the power of the states, came forward once more. The first was a holding that a state law confining jury service to male white persons was a violation of the provision of the fourteenth amendment that forbids a state to make or enforce a law denying to any person "the equal protection of the laws." Strauder, a negro, had been found guilty of murder by a white jury selected under such a law. He had objected to such a trial and demanded that his case be transferred to the United States courts, which was refused. The West Virginia Court of Appeals having confirmed his sentence, the case was taken to the United States Supreme Court, which reversed the Court of Appeals and set the sentence aside. It was held that Strauder had a right to remove the case to the United States Circuit Court to procure a vindication of his constitutional rights.

In Virginia *vs.* Rives, Burwell and Lee Reynolds, both colored, were indicted for murder and demanded a jury in part composed of colored persons. This was refused, and they applied for a removal of their case to the federal court. This was refused, and they were tried and convicted. Being given a new trial in the state court, they again presented their claim for removal under the United States statute which provided for it where one is denied a right guaranteed by United States laws or constitution, or is unable to enforce the same in state courts. They were again refused and one convicted, the jury disagreeing as to the other.

[1] *9 Wall*, 41.
[2] *107 U. S.*, 597.
[3] *100 U. S.*, 303.
[4] *Id.*, 313.
[5] *Id.*, 339 (1879).

At this stage of the proceedings their petition for removal was docketed in the United States Circuit Court and a writ issued to put them in the custody of the marshal. Then, without any motion to remand the case, the commonwealth of Virginia applied to the United States Supreme Court for a writ of mandamus to the circuit judge and marshal to return them. The court found the proceedings of the state in making the application proper, found that the law of Virginia made no discrimination among its citizens, white or black, as to jury service, and held that if the officers made such discrimination the appeal was, in the first instance, at all events, to the state authority, and that there was no case for removal, and they were directed to be returned to the state authorities.

Judge Field filed a concurring opinion. With his brilliant discussion in it of the writ of mandamus we are not much concerned, but he held that the act of Congress, so far as it attempted to give the United States courts jurisdiction to enforce state laws, was invalid and unconstitutional. The constitution had fixed the limit of the judicial power of the nation and had confined it to cases arising under the laws and constitution of the United States. Neither words nor implication extended it to cases arising under the laws of the several states. The downfall of nearly all the civil rights legislation of Congress is here distinctly prefigured. In *ex parte* Virginia, however, the next case, a portion of such legislation was sustained. J. D. Cole, county judge of Pittsylvania county, Va., was indicted and placed in the custody of the United States marshal of his district for excluding colored citizens from juries, whose selection was a part of his duties. He applied to the Supreme Court for a writ of habeas corpus, and the state of Virginia also applied for his liberation that he might discharge his ordinary duties.

The court concluded it was proper practice if a case for his release had been made out, but held that the act of Congress of March 1, 1875, section 4—that no citizen should be disqualified for jury service on account of race, etc., and that any officer who should exercise any such discrimination in selecting jurors should be fined not exceeding five thousand dollars—was constitutional, Judges Field and Clifford again dissenting.

The law they thought unconstitutional for lack of power on the part of Congress to interfere with such a purely local concern

as deciding who should and who should not serve as jurors. They thought that it was a political, not a civil, right, and like the right to hold an office, dependent on the will of the state.

The next [1] case was also a petition for a writ of habeas corpus. The act of May 31, 1870, and its supplementary act of May 28, 1871, known as the enforcement bill, was in question. Among its provisions were some making it a penal offense against the United States for an officer at an election for congressmen to do any act unauthorized by law, or make fraudulent certificates, or interfere with any other election officer in regard to such election. The petitioners, Siebold *et al.*, were indicted in the United States District Court of Maryland for violating this law while serving as judges of election in the city of Baltimore by putting in false ballots and making false returns.

It was argued that Congress must either provide for the entire management of elections or let the states do it. Judge Bradley, who rendered the decision, did not find such a meaning in the constitutional provision that Congress might not make or alter regulations for congressional elections:

[2] "The more general reason assigned to it, that the nature of sovereignty is such as to preclude the joint coöperation of two sovereigns in matters in which both are mutually concerned, is not, in our judgment, of sufficient force to prevent concurrent and harmonious action on the part of the national and state governments in the election of representatives. It is at most an argument *ab inconveniente*."

"There is nothing in the constitution to forbid such coöperation. If the two governments had an entire equality of jurisdiction there might be an intrinsic difficulty in such coöperation. By first taking jurisdiction of the subject the state would acquire exclusive jurisdiction in virtue of a well-known principle applicable to courts having coördinate jurisdiction over the same matter; but no such equality exists in the present case. The power of Congress is, as we have seen, paramount. We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force exercised through its official agents, execute on every part of American soil the powers and functions which belong to it."

"This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. This power to enforce its laws and to execute its functions in all places does not de-

[1] *Ex parte Siebold et al.*, *100 U. S.*, 391 (1879).

[2] *100 U. S.*, p. 392.

rogate from the power of the state to execute its laws at the same time and in the same place. The one does not exclude the other except where both cannot be executed at the same time. In that case the words of the constitution itself show which must yield. Without this concurrent sovereignty referred to the national government would be only an advisory government. Its executive powers would be nullified."

The conviction was upheld.

In *ex parte* [1] Clarke a similar case from Cincinnati was similarly decided. Judges Field and Clifford again dissent on the ground that the acts punished were violations of state law, and that the act of Congress itself could not make violations of state law punishable by United States authority. Judge Bradley's reasoning, that the acts of the defendants were violations of federal as well as of state statutes in a matter which the constitution had permitted Congress to act upon, seems unanswerable.

In [2] Newton *vs.* Commissioners, decided at the same term, an Ohio county seat had been by an act of the legislature "permanently" located at a certain place in consideration of the doing of certain things by the people of the locality. A subsequent act authorized the removal of the county seat. This was sought to be prevented in the federal court on the ground that it was impairing the obligation of the contract, but the court held that the location of a county seat is an exercise of political power which could not be bargained away.

In [3] Stone *vs.* Mississippi a lottery company had obtained, in consideration of the payment of $5,000 to the state treasury for the use of the University and an annual payment of $1,000, together with one-half of one per cent. on all receipts for tickets sold, a franchise to conduct a lottery for twenty-five years. The state having adopted a constitution forbidding such lotteries, the company sought to enjoin the state officers from enforcing it. But the Supreme Court holds, on the authority of [4] Beer Co. *vs.* Massachusetts and [5] Fertilizing Co. *vs.* Hyde Park, that the power of a state could not be limited by such an agreement, and the doctrine that no contract of a state can be held to limit its police power, so cautiously advanced in Fertilizing Co. *vs.* Hyde Park, was distinctly established.

[1] *100 U. S.*, 400 (1879).
[2] *Id.*, 548 (1879).
[3] *101 U. S.*, 814 (1879)
[4] *97 U. S.*, 25.
[5] *Id.*, 659.

In [1] Neal *vs.* Delaware the relations of the fourteenth and fifteenth amendments to the jury laws of that state was considered. Neal, a colored man, had been indicted in the Court of General Sessions in New Castle county for rape. His case had been removed to the Court of Oyer and Terminer of the same county, the highest court to which it could be taken.

There counsel was especially appointed for his defense, and filed a petition for its removal to the United States Circuit Court on the ground that both statute and constitution in that state denied to colored men the right to vote and only voters might serve on juries; that the officers of the court excluded colored persons in drawing juries, and he was denied the equal protection of the laws guaranteed him by the federal constitution. The petition was denied and the defendant excepted; then, before being arraigned, he moved to quash the panel of jurors for the reason that all persons of African race had been excluded on account of race and color. This was also overruled for the reason that, although no Africans were on the panel, there was no evidence that their exclusion was on account of race or color.

Defendant again excepted, and was arraigned. Before pleading he asked to be allowed to produce witnesses and the lists and panels of both the grand and petit juries of the court which found the indictment and of the court of trial. This was also refused, on the ground that the time for this was before the motion to quash was passed upon. He was found guilty and sentenced to death by hanging. A writ of error was issued to bring the case into the United States Supreme Court.

The constitution of the state confined the right of suffrage to free white male citizens of the age of twenty-one years and upwards. The statute on the subject of jurors provided that all persons qualified to vote at general elections, with certain specific exceptions, should be liable to serve as jurors; that the "levy court" for each county at its March session should select one hundred sober and judicious persons to serve as grand jurors and one hundred fifty as pettit jurors in the courts for the year to be held in the county, and one hundred twenty more to serve as petit jurors if called. From these names the jurors were chosen by lot. This method had been followed in getting a jury in this case.

[1] *103 U. S.*, 370 (1880).

The errors claimed were that the state court should have granted the removal, should have sustained the motion to quash the panel and should have allowed evidence to be taken in support of that motion. For the state it was answered that the federal constitution in the fourteenth and fifteenth amendments, made colored people citizens, and entitled them to vote; that the state constitution in that respect was thus superseded, and the jury law must be construed with reference to the changed conditions, and so made colored voters liable to jury service; that the motion to quash was unsupported by facts, and the application for leave to bring evidence of them came too late.

The court goes over the Virginia cases and again concludes the federal statute, allowing removals where inability to obtain a right guaranteed by federal law or constitution is shown, to be valid, and also the act forbidding discrimination in jury service on account of race. It holds that the fifteenth amendment of the federal constitution abrogated all provisions of the state constitution or statute denying to the colored race the right of suffrage, and that the petition for removal on that ground was rightly overruled.

But the court held that the motion to quash the panel of jurors should have been sustained.

"The fact, so generally known that the court felt obliged to take judicial notice of it, no colored person had ever been summoned as a juror in any court of the state, though its colored population exceeded twenty thousand in 1870, and in 1880 exceeded twenty-six thousand in a total population of less than one hundred fifty thousand, presented a *prima facie* case of denial by the officers charged with the selection of grand and petit jurors of that equality of protection which has been secured by the constitution and laws of the United States."

Justice Waite dissented because he thought that the decision of the trial court, that the showing of discrimination was insufficient, was not clearly shown to have been wrong. Judge Field, for the same reason and also the reason given in the Virginia cases, that the serving upon juries was a political right and the determination of their qualification was with the states.

The Virginia cases and Neal *vs.* Delaware were further applied in [1] Bush *vs.* Kentucky. He had been indicted in 1879 for murder. Under the ruling in the Virginia cases, his was removed into

[1] *107 U. S.*, 110 (1883).

the United States courts after one conviction had been had and reversed in the state courts. The indictment was quashed after such removal, on the ground that it had been found by a grand jury from which colored persons had been wrongfully excluded, and he was set at liberty.

A new indictment was then found against him. He alleged the former proceedings and his discharge by the United States court. The plea was held insufficient; the state court then ordered the sheriff to summon jurors without regard to race, and Bush again applied for a removal. This was refused. He was again found guilty, and his sentence affirmed by the Kentucky Court of Appeals, and by proceedings in error the case was taken to the federal Supreme Court.

It appeared that the state statutes provided for only white jurors; it also appeared that the state Court of Appeals, its highest tribunal, had held those statutes unconstitutional; it was shown that a motion to quash this second indictment, on the ground of the unlawful exclusion of colored men from the grand jury returning it, had been overruled. The Supreme Court, in an opinion by Judge Harlan, held that in the absence of evidence it was to be presumed that the state officers followed the state statute, and that the jury was wrongly drawn, and the overruling of the motion to quash therefore erroneous.

The next week was decided a case, [1]Pace *vs.* Alabama, which held that the Alabama statute in providing one punishment for fornication between parties of the same race, and a severer one where one party was white and the other black, infringed no constitutional right.

At the same time section 5519 of Revised Statutes of the United States was held unconstitutional in [2] United States *vs.* Harris. The section provided a fine for conspiring or going in disguise on the highway on another's premises to deprive any person of the equal protection of the laws or of equal immunities under the laws, or to hinder the constituted authorities from securing to each person such equal protection.

The defendants, Harris and others, had been indicted in the western district of Tennessee under this statute, and had demurred to the indictment; the judges had disagreed as to the case, and cer-

[1] *106 U. S.*, 583 (1883). [2] *Id.*, 629 (1883).

tified such disagreement to the Supreme Court. The Supreme Court held that the fifteenth amendment had no relation to the case; that the fourteenth had no more, because it served only as a restraint upon state and not upon private action; that the thirteenth could not uphold the statute, as the latter related to conspiring for other purposes as well as such as were connected with that amendment, and was by no means confined to attempts to enforce slavery or involuntary servitude, and it was therefore unconstitutional.

That the fourteenth amendment, in subjecting the exercise of police powers by the state to the supervision of the federal Supreme Court had not essentially reduced them was again shown in [1] Escanaba and Lake Michigan Transportation Company *vs.* The City of Chicago. The steamships of the plaintiff company, in carrying iron ores up the Chicago river, found themselves inconvenienced by certain ordinances of the city which required drawbridges over the river to be closed from six to seven o'clock in the morning and from 5.30 to 6.30 in the evening, and between those hours not to be kept open while passengers were waiting to cross longer than ten minutes at a time, and when closed to remain so for twenty minutes if needed to accommodate passengers.

The regulation was found by the court to be a reasonable one, and though the stream was held a navigable river, Congress not having acted on the matter, the authority of the city unquestionable. A long line of federal authorities, among which Chief Justice Marshall's opinion in [2] Wilson *vs.* Blackbird Creek Marsh Company and Justice Curtis' in [3] Gilman *vs.* Philadelphia were foremost, were cited.

In October, 1883, the five cases known as the Civil Rights cases were decided. Two of them, the [4] United States *vs.* Stanley and the United States *vs.* Nichols, were for refusing colored persons hotel accommodations. Two of them, the United States *vs.* Ryan and United States *vs.* Singleton, were for refusing accommodation in theatres, and the other, Robinson and Wife *vs.* Memphis, etc., Railway Co., was for refusing to let the wife ride in the ladies' car on defendant's road, as she claimed, because of her African descent.

The Stanley case came on a certificate of difference of opinion from United States Circuit Court of Kansas; the case *vs.* Nichols

[1] *107 U. S.*, 678 (1883).
[2] *2 Pet.*, 245.
[3] *3 Wall.*, 713.
[4] *109 U. S.*, 3.

on a like certificate from Missouri, and the case against Singleton in the same way from New York; the case against Ryan on error to the Circuit Court of California, and Robinson and wife against the railway from Tennessee on error. The Circuit Court of California had sustained a demurrer to the information against Ryan for refusing accommodation in his theatre to colored persons, and held the civil rights act unconstitutional. In Tennessee the Circuit Court had held the law valid, but the plaintiff had been defeated in a trial on the merits of her action, the jury finding that the railway conductor had reason to refuse admission to the plaintiff aside from her color.

The obvious question in all of these cases was the constitutionality of the first two sections of the act of Congress of March 1, 1875, originally enacted in substance in 1866, and the right of Congress to legislate in this manner for the people of the states. The first section provided that all persons in the jurisdiction of the United States should be entitled to equal accommodations and privileges in public inns, conveyances and places of amusement, subject only to conditions not relating to race, color or former servitude. The second section provided a penalty of five hundred dollars, to be paid to the persons aggrieved in case such equal accommodations were denied, and made every one who was in any way responsible for such denial guilty of misdemeanor and subject to a fine of from five hundred to one thousand dollars, or to imprisonment for from thirty days to one year.

Judge Bradley, who gave the opinion of the court, says that the principal argument for the constitutionality of the act was the views and opinions of distinguished senators advanced when the law was under discussion in their bodies, and that the authority, if any there is, in the federal constitution for such laws must be found in the last three amendments, and especially in the first section of the fourteenth; but this had been already held to be merely a prohibition on the states.

"Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and a broader scope. It nullifies and makes void all state legislation and state action of every kind which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will thus declared may not

be a mere *brutum fulmen*, the last section of the amendment invests Congress with power to enforce it by appropriate legislation; to enforce what? To enforce the prohibition; to adopt appropriate legislation for correcting the effects of such prohibited state laws and state acts, and thus to render them effectually null, void and innocuous. This is the legislative power conferred on Congress, and the whole of it. . . . ."

"It does not authorize Congress to create a code of municipal law for the regulation of private rights, but to provide a mode of redress against the operation of state laws and the action of state officers, executive and judicial, when these are subversive of the fundamental rights specified in the amendment."

[1] United States *vs.* Cruikshank, [2] Virginia *vs.* Rives and [3] *ex parte* Virginia are especially referred to. The section of the law held valid in the last-mentioned case is again pointed out to be entirely prohibitory on the states and their officers.

It is forcibly pointed out that deprivation of a right in the sense meant by the constitution can only be by political authority. The act of a private individual may invade a right and prevent temporarily its enjoyment, but it still inheres in the holder, and he presumably has his remedy. Of course, this rests upon the theory of [4] Hobbes that legal rights are derived from the state. However offensive this may be to moralists, it will probably have to be conceded by lawyers.

No foundation for the law is found, then, in the fourteenth amendment; in the thirteenth is no authority for legislation except upon slavery and involuntary servitude. And in the fifteenth none except with regard to rights of suffrage. The law is, therefore, held invalid so far as these amendments are related to the two sections of it under consideration.

The earnest dissenting opinion of Judge Harlan seeks to find in the thirteenth amendment and its abolition of slavery and servitude and the power given to Congress to enforce it by appropriate legislation, authority to legislate on all social usages and practices growing out of slavery. His success does not seem great. It is a resort to implication beyond anything of the kind ever used in constitutional interpretation, and besides loses sight of the fact that the social usages are not necessarily founded on slavery, and prevail, if anything, even more strongly in states where slavery was never tolerated.

[1] *92 U. S.*, 542.
[2] *100 U. S.*, 313.
[3] *100 U. S.*, 339.
[4] *Leviathan*, chap. 18.

The extended latter part of his opinion, in its argument to show that the general public had rights in the use of inns, public conveyances and public places of amusement seems beside the point. He has no difficulty in showing the large extent to which legislation as to all of them had been enacted, and how thoroughly they are within the grasp of public power. But the question was not as to the right to legislate on these subjects. The question was whether that right was vested in Congress or in the state legislatures. Its possession by the latter is made by Judge Bradley the ground for denying it to the former.

He once more questions the doctrine of the slaughter-house cases that the privileges and immunities of citizens of the United States referred to in the fourteenth amendment are only such as the constitution of the United States in terms or by distinct implication confers. He declares that the enjoyment of the rights sought to be vindicated in the civil rights bill, are among those included.

The weakness of his position appears when he asserts that these rights are as much secured to the negro by the thirteenth as the right of suffrage is by the fifteenth amendment. The prompt answer to which is, as the court had already held, no right of suffrage is secured to the negro by the fifteenth amendment; only that it shall not be denied him on account of his race and it is expressly named.

That the men who passed the civil rights bill and secured the adoption of the constitutional amendments thought they were obtaining for Congress the power to legislate over these subjects, is indubitable. To secure their adoption, however, they were couched in such general terms that the interpretation given to them in the Slaughter-House cases was inevitable when they fell into such able conservative hands as Judge Miller's.

His refusal to see in the privileges and immunities secured to each citizen by them any more than what the former interpretation of the constitution had placed among its guarantees, or to find any prohibition on legislation by the state with regard to their own citizens except what was plainly declared in the amendment, was clearly necessary to maintain the position of the state governments and prevent the lapsing of practically all legislative power over personal and property rights into the hands of Congress.

The alternative is that contended for by Judge Harlan in this case.

"I venture, with all respect for the opinion of others, to insist that the

national legislature may, without transcending the limits of the constitution, do for human liberty and the fundamental rights of American citizenship, what it did with the sanction of this court for the protection of slavery and the rights of the masters of fugitive slaves. If fugitive slave laws, providing modes and prescribing penalties, whereby the master could seize and recover his fugitive slave, were legitimate exertions of implied power to protect and enforce a right, recognized by the constitution, why shall the hands of Congress be tied so that under an express power by appropriate legislation to enforce a constitutional provision, granting citizenship, it may not by means of direct legislation bring the whole power of the nation to bear upon states and their officers and upon such individuals and corporations exercising public functions as assume to abridge or impair or deny rights confessedly secured by the supreme law of the land."

Of course the objection to this is that the slaughter-house cases had held that the rights covered by the laws in question were so far from being confessedly guaranteed by the constitution that they were not guaranteed by it all. That Judge Bradley, who had so strongly dissented from the conclusion reached in the slaughter-house cases should now be so strenuously supporting it, shows the change a decade of experience and reflection had wrought in his mind. It seems remarkable that Judge Harlan should have ventured to assert that the rights of the negro to use of inns and public resorts without discrimination on account of race rests on as express a constitutional warrant as did the master's right to reclaim his fugitive slave, and should say this without asking that the Slaughter-House cases be overruled, at least in all that portion of them defining what are and are not "privileges and immunities of citizens of the United States."

The truth is that a different decision by the court on this civil rights question, would have had no social effect to take away the color bar. The social purpose sought in this legislation, to borrow a phrase from Judge O. W. Holmes, was not then shared by the people and would not be to-day. There was room for a conservative construction that would defeat the law and the court adopted it rather than engage in a hopeless struggle to enforce it against social habits with which the court's members in fact sympathized.

The country has accepted its conclusions, and the inclination to attempt any such explicit change of the federal constitution in such terms that the court could not avoid it, has long gone by. The people of this country as a whole never desired any far-reaching al-

teration in the relative positions of the state and federal governments. There has never been a day since the doctrine of the slaughter-house cases was first announced, when any effort to adopt a new amendment that would do in unmistakable terms, what the proposers of the fourteenth amendment undoubtedly thought they had done, namely, give Congress the general power to legislate as to the rights and relations of citizens in the states, would have had any chance of success. None has ever been seriously proposed.

The so-called police power will remain with the states while there are states, if for no other reason than because, when it is taken away, they will be removed. Justice Miller deserves the credit of seeing clearly that they would not be states without it. The writers, like the author of "Political Science and Comparative Constitutional Law," who profess regret that this power was not held by the court to have been handed over to Congress by the fourteenth amendment, certainly do not recognize that what they want transferred is really the whole legislative power of the states. Their autonomy would be gone. Their police power is, as Chief Justice Marshall conceived it, the remnant of sovereignty left with them on the creation of the federal government.

At the same term with the civil rights cases was decided *ex parte* [1]Yarborough *et al.*, the Ku Klux cases. Jasper Yarborough and seven others had been convicted in the northern district of Georgia on indictments for conspiring to intimidate on account of his race, Berry Saunders, of African descent, in the exercise of his right of voting. It was claimed that Congress had no power to provide a punishment for this. Justice Miller, however, and the court thought otherwise. The right, they said, not to be disturbed because of his race in voting is expressly given him by the fifteenth amendment and the authority to protect him in that right is as plainly given to Congress as is the right to protect the mails and the money in them and more so.

The doctrine of [2]Minor *vs.* Happersett that no right of suffrage is given by the amendment does not do away with the right of Congress to protect by legislation what is given, so once more we have police laws to govern elections passed by Congress and upheld by the court. The court, however, does not find it necessary to talk about any "electoral power" in Congress any more than it did to

[1] *110 U. S.*, 651 (1883). [2] *26 Wall.*, 178.

make mention of "postal power" in *ex parte* Jackson. It is difficult to see why they might not as well do that as discuss a "commercial power," a term which has been well known in the opinions of the court, at least ever since Justice McLean's discussion of the passenger cases.

At this same important session, too, the power of the [1]state was relieved from what threatened to be a severe restriction in the construction of the term due process of law. In 1879 the people of California had adopted a constitution providing that prosecutions for crime might be by information instead of by indictment or presentment of a grand jury. May 7, 1882, Hurtado had been convicted of murder in Sacramento county, California, on information for that crime without any investigation or presentment by a grand jury.

It was claimed on his behalf that such a conviction was not due process of law. The Supreme Court of the state, however, found that it was, and on error to the federal Supreme Court it was affirmed. Justice Matthews holds that the provision did not require presentment by a grand jury and due process of law as meant by the constitution cannot be given the effect of requiring the states to abide by the legal procedure in vogue at its adoption if the substitute is one which accords with legal principles and the needs of justice.

In the same term the [2]slaughter-house cases came up in a new form. The legislature of Louisiana had repealed the franchise which had been held good in those cases. The holders of it claimed that this was an impairment of the obligation of a contract as their charter under which they had expended considerable sums of money, gave them an exclusive franchise to maintain stock yards and slaughter-houses for the city of New Orleans for a number of years. When the Butchers' Union Company were about to take advantage of the repeal and engage in the business the Crescent City Company procured from the federal Circuit Court an injunction against their doing so on the ground that the repeal of the exclusive franchise of the Crescent City Company was in violation of the federal constitution as impairing the obligation of a contract.

Judge Miller again rendered the opinion and this judge who in [3]Loan Association *vs.* Topeka had declared that the executive, leg-

[1] Hurtado *vs.* Cal., *110 U. S.*, 516 (1884).

[2] Butchers' Union & Co. *vs.* Crescent City & Co., *111 U. S.*, 746.

[3] *20 Wall.*, 635.

islative and judicial branches of the state and federal governments are all of limited and defined powers now found himself called upon to say whether one legislature could suspend for future legislatures, "that well-known but undefined power called the police power." He finds no better definition for this power than Kent's, 2 Comm. 340, which he had cited in the former case.

"Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought to so use his property as not to injure his neighbors, and that private interest must be made subservient to the general interests of the community."

The law had been upheld in the former case expressly because it was an exercise of the police power and saved from condemnation as an interference with freedom to follow an ordinary occupation by no other argument; therefore, the franchise could not now very well be defended as not being an act of police. The question was clearly whether the police power could be bound by a state contract granting an exclusive franchise for a term of years. Following Stone *vs.* Mississippi and the preceding cases on which it is based, Justice Miller, who in the case of Fertilizing Company *vs.* Hyde Park, had refused to concur in this doctrine and had concurred in that case only because he was able to persuade himself that the charter was not violated, now himself, in plain terms, holds that such power of the legislature is given it to use and not to sell, and cannot be restrained by contract.

Justices Field and Bradley concur in this decision because they say the original act was void and not a police regulation at all, but a mere monoply, having such alone for its object. They again protest against the narrow limits given in the Slaughter-House cases to "privileges and immunities of citizens of the United States," but they themselves had since concurred in carrying that narrow construction into effect in more than one case, and it was now too late to widen it.

At the same term, as in Hurtado *vs.* California it had been decided what was due process of law in a capital criminal case, so now in [1]Hager *vs.* Re-Clamation District, the effect of that provi-

[1] *111 U. S.*, 701.

sion upon property rights was determined. The California law for reclaiming swamp and overflowed tide-lands and making them fit for culture was assailed. Districts were to be formed and the reclamation of such land therein undertaken on a petition by a majority of owners of lands concerned. Engineers were to be employed and three trustees be selected from the owners who were to report plans of work and estimates of costs to the county supervisors, and the latter were to appoint three commissioners to assess on each acre to be benefited, its proportionate share of expense to be collected with the annual taxes. If necessary the commissioners might make another assessment and report the additional amount. The assessments were to remain with the supervisors thirty days, and if not then paid to be sent to the district attorney to be collected like delinquent taxes.

In Yolo and Colusa counties 74,000 acres of land in one body capable of such reclamation was found. A district was formed and the commissioners estimated the expense at $140,000; it was found, however, that $192,000 more was required, and it was all assessed upon the lands. It was not paid and suits to collect it were transferred by non-resident owners to the federal Circuit Court, and there the lands were ordered sold to pay the assessments, and from this decree an appeal taken. The proceeding was held to be due process of law and the decrees affirmed. The act is held to be within the police powers of the state in providing for the general welfare and in no way interfered with by the terms of the fourteenth amendment.

With the setting aside of the civil rights bill and the final settlement of the right of the federal government to supervise the election of federal officers, the reconstruction cases seemed to have closed, and with the final upholding of the legal tender act, at the same term, the legal results of the war seemed to have been practically realized. The development of the results of the fourteenth amendment, however, as applied to the commercial life of the country, foreshadowed in Fuller *vs.* Railroad Company and the Granger cases was just beginning.

Just as the development of the doctrine of the Dartmouth College case and of Gibbons *vs.* Ogden in bringing forward federal restraint against state action by way of impairing the obligation of contracts and regulating commerce, had rendered a corresponding development of state power inevitable, and had given us the term

police power and its subsequent development, so we shall see as we have seen, that the maintenance of the due equilibrium required and caused the police power of the states to keep pace with the advancing application of the fourteenth amendment also. The raising of the levee on one side of the Mississippi river and crowding it forward against the waters does not more inevitably call for a corresponding increase in height on the other side.

CHAPTER XI.

THE FEDERAL SUPREME COURT AS THE ULTIMATE TRIBUNAL OF PERSONAL AND PROPERTY RIGHTS.

At the session of the court beginning October, 1884, the cases of [1]Foster *vs.* Kansas as to prohibitory liquor laws and [2]Wurtz *vs.* Hoagland as to the New Jersey drainage laws and especially [3]Barbier *vs.* Connolly as to the relation of the fourteenth amendment to the "power of the state, sometimes termed its police power," are noteworthy.

In the case of [4]Foster *vs.* Kansas, plaintiff had been county attorney of Saline county in that state and had refused to prosecute for sales of intoxicating liquors made in violation of the state constitution and statutes to enforce it. Quo warranto proceedings were commenced against him in the Supreme Court of the state, and he was removed from office. He obtained a writ of error, alleging the statute in question unconstitutional, though authorized by statute, the rules of civil procedure being applied to his case while he insisted that it was a criminal action.

The court held that absolute prohibition of sales for use as a beverage violated no principle of the federal constitution, and was no deprivation of property in liquors or in liquor manufacturing plants, and held the procedure adopted in this case constitutional. This very brief opinion marked the final abandonment of the once prevalent opinion that absolute prohibition of liquor sales for use as a beverage was a violation of rights of property when applied to stock on hand, although the United States Circuit Court for Kansas, two years later, in State *vs.* Walruff, asserted such a doctrine, and we shall see it attempted to be set up again in the Supreme Court.

In [5]Barbier *vs.* Connolly the plaintiff was convicted of washing and ironing clothing between 10 o'clock in the evening and 6

[1] *112 U. S.*, 201.
[2] *114 U. S.*, 606.
[3] *113 U. S.*, 27.
[4] *112 U. S.*, 201.
[5] *113 U. S.*, 27 (1884).

o'clock the following morning in a public laundry in the city of San Francisco; an ordinance of the city required that within certain limits, for the sake of public health and security from fire, such work should not be done without a license from the city authorities and a certificate of the fitness of the premises used for the purpose, and not at all between the hours named. He claimed that the law and the ordinance passed in accordance with it were in violation of both federal and state constitutions, and especially of the fourteenth amendment. The state courts sustaining the conviction, he obtained a writ of error to the federal Supreme Court.

That court, in an opinion by Justice Field, says the purpose sought is a public one and the regulation such as municipal authorities are entitled to make and declined to interfere with it. The fourteenth amendment in declaring that no state shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended not only that there be no arbitrary deprivation of life or liberty or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of personal and civil rights:

"But neither the amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations, to promote the health, peace, morals, education and good order of the people and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character having in view these objects must often be had in a certain district, such as for draining marshes and irrigating arid plains; special burdens are often necessary for general benefits."

The provisions of this ordinance though severe were found designed to answer a public purpose and apparently imposed in good faith.

In [1]Wurtz *vs.* Hoagland such police legislation for the prosperity of the state of New Jersey was under consideration. It provided that on application of at least five owners the board of managers of the State Geological Survey should examine any tract of marshy or boggy land, and if they thought it for the public interest and that of the owners affected, make surveys and report a system

[1] *114 U. S.*, 606 (1884).

of drainage to the Supreme Court of the state, which on reasonable notice should appoint three commissioners to carry it out, unless a majority of the owners should object. The expense and description of the land which ought to contribute to it were reported and notice given again with four weeks to object; and if objection was made, it should be summarily decided by the court, and the commissioners proceed to make assessment of the due proportion of each parcel in the expense, which assessment was to be published for six weeks, and any objections then made to be summarily decided by the court; and if assessment was set aside it should again be referred to the commissioners, and like proceedings had till a valid assessment was obtained. If not paid by a certain time the lands were to be sold to satisfy the assessment.

Under this statute Mrs. Wurtz' land was assessed to pay the sum of $13,347.84, and over her objections this was confirmed by the state court and a writ of error procured from the federal Supreme Court because the decree

"violated the constitution of the United States in this, that it deprives plaintiffs in error of their property without due process of law, denies to them the equal protection of the law and violates the first section of the fourteenth amendment of the constitution of the United States."

The court, in an opinion by Judge Gray affirming the action of the state court, says:

"Laws for the draining and embanking of low grounds and to provide for the expense, for the mere benefit of the proprietor and without reference to the public good, are to be classed not with the taxing, but to the police powers of the government."

Chancellor Zabriskie's opinion in Tide Water Co. *vs.* Coster and Barbier *vs.* Connolly are cited.

In the session of 1885 and 1886 the number of cases brought into the court relating to property rights under the fourteenth amendment must have made Judge Miller wonder how he came to say he did not believe there would ever be a case brought in that court claiming denial of equal protection of the laws, except on behalf of some member of the African race. In [1]Missouri Pac. Railway Co. *vs.* Humes, the railway company had been sued for killing a mule. By law of the state of Missouri if a railway company failed to fence its lines, double the amount of damages sustained

[1] *115 U. S.*, 512 (1885).

could be recovered for all stock injured on the right of way by passing trains. This was claimed by the company to be a denial of the equal protection of the laws and to deprive it of property without due process.

The court by Judge Field promptly held that there was no foundation for such a claim; that the act was a valid police requirement, and that having killed the mule the company must pay for two like him. In this decision the Supreme Court of the United States, while following the prevailing ruling of the state courts, is not by any means supported by all of them.

In [1]New Orleans Gas Light Company *vs.* Louisiana Light Company, the Louisville Gas Company *vs.* Citizens' Gas Light Company and New Orleans Water Works Company *vs.* Rivers, the old struggle between the police power and the doctrines of the Dartmouth College case came back once more, and it is noticeable that decisions of the lower courts were reversed in all three cases. The Dartmouth College case still had more of vitality in it than the lower courts had believed. The latter had relied too strongly on the declarations in Beer Company *vs.* Massachusetts, Fertilizing Company *vs.* Hyde Park, Stone *vs.* Mississippi and Butchers' Union Company *vs.* The Crescent City Live Stock Landing Company, and had too hastily concluded that there was nothing left of the doctrine of the Dartmouth College case.

The New Orleans Gas Light Company, because of holding a charter from the state giving it an exclusive franchise for a number of years, was held to be entitled to enjoin another company, authorized thereto by the legislature, from laying gas mains and pipes and furnishing gas in the city. A similar right was allowed to the Louisville Gas Company in Louisville, and in New Orleans Water Works Company *vs.* Rivers, the lessee of the St. Charles Hotel, seven blocks from the Mississippi river, was prevented from supplying his house with water by pipes laid to that stream because the water works company had an exclusive franchise for fifty years to do that. The Supreme Court of the United States granted the water works company its injunction in an opinion by Judge Harlan, closing with:

"Under its averment, plaintiff was entitled to a decree perpetually restraining the defendant from laying pipes or mains in the public ways of

[1] *115 U. S.*, 650 (1885).

New Orleans for the purpose of conveying water from the Mississippi river to his hotel; in common with all corporations and other citizens of New Orleans, he must abide by the contract which the state made with the plaintiff, for such is the mandate of the constitution of the United States."

He concedes that regulating the supply of light and water to a municipality is a police function "in the widest definition" of the term. He grants that the cases of Stone *vs.* Mississippi, Fertilizing Company *vs.* Hyde Park and Beer Company *vs.* Massachusetts establish that no corporate franchise can be held to interfere with the right and duty of the state to guard the public health, morals and safety. Within this limit the police power prevails over the constitution as expounded in the Dartmouth College case.

That a supply of light and water has relation to health, and on the authority of Macaulay's remark that the gas companies in London, by lighting it, had done more to suppress crime than all the governments since Alfred, also to safety, if not to morals, is admitted; but the connection is held not close enough to restrain the application of the Dartmouth College precedent. The distinction from the case of Butchers' Union Company *vs.* Crescent City Live Stock Company is still harder to draw. Water supply would seem to have as close a connection with public health and morals as butchering, but Judge Harlan says the original franchise, in that case, was upheld only as a mere police regulation and was repealable as such.

Under these decisions we have two kinds of police power, one of which is restrained by valid contracts made by the state, and the other, which has to do with public health, safety and morals, is not. The result is, that the doctrine of Stone *vs.* Mississippi is not extended to municipal franchises for supplying water and light. The plain truth seems to be in questions of this kind, if the public emergency is one that has been deemed by former courts urgent enough to overthrow the municipal contract, then the latter goes down; if not, then the doctrine of the Dartmouth College case is applied and the contract upheld. Meanwhile the court is careful to point out that there is a remedy—by the exercise of the power of eminent domain to condemn the franchise, by paying for it and removing it when it becomes intolerable.

At this same session another clause of the constitution did not come off so well in a contest with the police power. In [1]Morgan's

[1] *118 U. S.*, 455 (1886).

Louisiana T. R. & S. Company *vs.* Board of Health, the plaintiff steamship company obtained an injunction against defendant's collecting from its ships the fee allowed by a Louisiana law for each vessel examined and passing the quarantine station. The Supreme Court of the state dissolved the injunction. On error, that of the United States affirmed such action. The steamship company claimed that since the law graded the inspection fee by the size of vessels, it was a tonnage duty and forbidden in the federal constitution.

Judge Miller for the court says, "If there is a city in the United States that needs quarantining, it is New Orleans." He declines to say that the city must bear all the expense of inspection, and sees no objection to proportioning fees to the size of the vessel. He admits that the law might be said to be in some sense a regulation of commerce, because it certainly affected commerce, and as such doubtless came within the scope of federal authority, but it was also an exercise of police power, and good till Congress should abrogate it.

At the session of 1886–7, the right of gas and water companies to enjoy their franchise against any exercise of police power, even by the people in adopting a new constitution, was decided again in [1]St. Tammany Water Works Company *vs.* New Orleans Water Works Company. Over so much of the police power the triumph of the constitutional principle as to the impairment of contracts may be considered settled.

In [2]City of New Orleans *vs.* Houston the same constitutional provision prevailed again. The legislature of Louisiana had in 1868 chartered a lottery company for twenty-five years, and in the charter provided that it should pay the state $40,000 a year and not be subject to any other taxes. In 1879 a new constitution had been adopted establishing uniformity of taxation. In 1880 it was enacted that the city should have power to levy taxes which it was claimed covered the lottery company also.

The company procured the taxes enjoined as impairing the obligation of the state's contract. The Circuit Court sustained the injunction and the city authorities appealed to Washington. The Supreme Court upheld the injunction and the contract. It was with a lottery company, but related to taxation and not to the continuance of the business, and it was within the power of the state to sell

[1] *120 U. S.*, 64. [2] *119 U. S.*, 265.

its right to tax the company, though not its right to abolish it, and the doctrine of Stone *vs.* Mississippi did not apply.

In the case of [1]Wabash, St. L. & P. R. R. Company *vs.* State of Illinois, its old antagonist the commerce clause gained a fall against the police power in a matter of serious moment. The attempt of a state to regulate charges for transportation of goods taken beyond the state was held unauthorized even as to the distance they were carried within the state. This was an important limitation of the Granger cases, and one of a long series of recessions from the position taken in them.

The railroad had taken a carload of merchandise from Peoria to New York for 15 cents a hundred pounds. On the same day it took from Gillman, Illinois, to New York a carload of similar goods for which it charged 25 cents a hundred pounds. The distance from Peoria is eighty-six miles farther and the Peoria car went through Gillman. An Illinois statute provided that if a railroad, by any direct charge, rebate, shift or devise, should charge for transporting any passenger or freight more than was charged for transporting in the same direction any other passenger or equal amount of freight of the same class, such charge should be *prima facie* evidence of unjust discrimination, and fixed a penalty not exceeding $5000 with treble damages to the party injured for such discrimination.

The railroad company demurred to the constitutionality of the law, and the trial court found in its favor. The Supreme Court of the state, however, reversed this, and held the law good and not an infringement on the power of Congress under the commerce clause. Judge Miller, in the opinion of the court reversing this action, says that the precise question was not altogether new though not previously determined.

He admits that the language used in the Granger cases bears the meaning that states in which traffic originates may regulate rates though it goes beyond their borders, and concedes that in those cases the question of the effect of the state's action upon interstate commerce was treated as another application of the doctrine as to quarantine regulations, bridges over navigable streams, pilotage, etc.—that is, the states might act upon it, but not contrary to the express will of Congress.

He says, however, the main question was the right of the states

[1] *118 U. S.*, 557 (Oct., 1886).

to establish any regulation of rates over railroads. This was objected to, first, because it was the taking of property without due process, and, second, because it was a violation of their charters and an impairment of the obligation of the state's contract. These two questions, he thinks, were rightly resolved in those actions against the companies. The right of a state to impose such rates upon goods going beyond its borders, he thought, should be considered by itself. Citing State Freight Tax cases and Hall *vs.* DeCuir, he thinks they show that the court never intended to hold there is power in a state over goods going beyond it, and that such power is inconsistent with the free passage of persons and merchandise into and out of each state.

Judge Bradley dissented, and Justices Waite and Gray with him, on the ground that the state court had a right to presume that a contract to haul from Peoria to New York for a fixed price was an agreement to haul over each mile of the designated route for a proportionate share of that price, and the varying of prices in this case was, therefore, a discrimination practiced within the state of Illinois and amenable to its laws.

In holding that the state court might assume that the charge was at a uniform rate over the whole length of the route, and therefore at a forbidden rate in Illinois, the minority seem to have fairly exposed themselves to Judge Miller's criticism. If Illinois could do that, so could Indiana and Ohio and Pennsylvania and New York as to the portion of the route lying through the territory of each; and in the event of discordant regulations by these states through traffic would become impossible.

Indeed, the holding now firmly adopted by the court, that the states have no sovereignty over interstate and foreign commerce for any purpose, that there is conferred by the federal constitution upon citizens of each state and of the United States an indefeasible right to take into or carry away from any state any article of commerce they please, subject only to such regulations as Congress may make or sanction, effectually precludes the unimpeded exercise of such a police power as Judge Bradley talks about.

There seems only an implied consent that the states may provide for the public health, safety and morals in cases of real need by any regulation not forbidden by Congress.

In [1] Robbins *vs.* Taxing District of Shelby County, it was de-

[1] *120 U. S.*, 489.

clared that the only way in which a state can act upon interstate commerce is in the exercise of its police power. The right to tax it in any way was denied, and a statute putting a tax of ten dollars per week or twenty-five dollars per month upon all "drummers" soliciting orders for goods was held void as respecting solicitors for persons outside of the state, although the same tax was lawfully assessed upon those soliciting for persons within the state.

From this to the doctrine of [1] Bowman *vs.* Chicago & Northwestern Railway Company was but a step. This was a suit for ten thousand dollars' damages brought by George and Fred Bowman in the United States Circuit Court for the Northern District of Illinois against the Chicago & Northwestern Railway Company for refusing to transport five thousand barrels of beer from Chicago to Marshalltown, Iowa. The railroad company answered that it was intoxicating liquor, and set up an Iowa statute providing that any railroad bringing such liquor into the state for any person without a certificate from the auditor of the county where it was to be delivered that such person was licensed to sell it should be fined one hundred dollars and costs for each offense, and such offense be complete in every Iowa county into or through which the liquor should be carried, and that plaintiffs had tendered no such certificate.

Plaintiffs demurred to the answer, the demurrer was overruled and the defendants had judgment. To reverse this plaintiffs procured a writ of error from the Supreme Court. In an opinion by Justice Matthews it reversed the judgment and holds it no defense for the railroad company that the consignee had no such certificate as the Iowa law required, because the act as regards such transportation is void. The [2] Freight Tax cases are cited, to the effect that transportation is a part of commerce.

The forbidding introduction of liquors without license is held to be clearly a burden upon that which Congress, by not regulating, had provided should be free. It was admitted that the policy of the state of Iowa forbidding the sale of alcoholic beverages was adopted with a view to preserve the health and morals of its citizens from contamination, and is a measure adapted to that end. Nevertheless, such liquors are ordinary subjects of commerce, and the law an invasion of the exclusive domain of Congress.

[1] *125 U. S.*, 465 (March, 1888). [2] *15 Wall*, 232.

The effect of this decision is to place the authority of Congress wholly above the "sovereign" and "exclusive" police power of the state. This is probably an inevitable consequence of holding a paramount authority to regulate in Congress, and holding that such authority does not stop at the state's border, but accompanies the imported article to its destination within the state.

CHAPTER XII.

POLICE POWER PREVAILS AGAINST PROPERTY, BUT NOT AGAINST COMMERCE.

The case of [1] Mugler *vs.* Kansas ended the contention of liquor dealers and manufacturers that prohibitory laws are an unconstitutional attack on their property. Peter Mugler was prosecuted in Saline county, Kansas, for manufacturing intoxicating liquors without a permit. Ziebold & Hagelin, of Atchison county, in that state, were proceeded against to have their brewery in that county declared a nuisance and abated, also that they be enjoined from using it as a brewery except in accordance with Kansas laws. Mugler's case was decided against him in the state courts, and he procured a writ of error from the Supreme Court of the United States. Ziebold & Hagelin's case was transferred by them to the United States Circuit Court of Kansas and there tried and dismissed, and appealed by the state to the federal Supreme Court.

So there were two actions—one brought by Mugler to reverse the convictions against him in the state court, and the other brought by the state to reverse the action of the federal Circuit Court in dismissing its proceedings against the Atchison brewers. In both cases the question was the constitutionality of the Kansas constitution and legislation.

In 1868 that state had passed a law making it a misdemeanor to sell intoxicants without a license and requiring that all places where liquors were so sold should be deemed common nuisances and abated as such. In 1880 the state adopted an amendment to its constitution forever forbidding the manufacture and sale of intoxicating liquors in that state except for medicinal, mechanical and scientific purposes. To enforce this amendment, in February, 1881, the legislature of the state passed an act requiring the obtaining of a permit for the manufacture or sale of liquors for such purposes, and forbidding all other sales, and providing a system of penalties for violation of the act.

[1] *123 U. S.*, 623 (1887).

The law also provided that all places where such liquors were made, sold, bartered or given away contrary to the law, or where they were kept for that purpose, should be deemed common nuisances, and when they should be found to be such by any court of competent jurisdiction, the proper officer should be directed to abate and close them and destroy the liquor and vessels containing it.

Mugler had erected his brewery in Saline county, Kansas, in 1877, at a cost of $10,000. It was still worth that sum for that use, but worth not more than $2500 for any other purpose. He had continued operating it, after the enactment of the law, without a permit. He was a citizen of the United States, and had conducted the same place of business in the same manner ever since 1877. He appealed to the fourteenth amendment of the federal constitution to protect it.

In the other case, Ziebold & Hagelin's plant had cost $60,000. It had been in operation about as long as Mugler's. When proceeded against as a nuisance under the state law the proprietors claimed the protection of the fourth and fourteenth amendments of the federal constitution and asked a removal of the case to the federal court, which was refused on the ground that the federal court had already ruled against the alleged right in Bartelmeyer *vs.* Iowa and Beer Company *vs.* Massachusetts and Foster *vs.* Kansas. The defendants, however, had the case docketed in the United States Circuit Court, and that court retained jurisdiction and refused to remand it, and at the trial dismissed it over the state's objection.

The Supreme Court in an opinion by Justice Harlan affirmed the action of the Kansas State Court and reversed that of the Circuit Court, and held the Kansas constitution and the statute to enforce it to violate no provision of the federal constitution so far as these two cases were concerned. Whether or not the brewers had a right to use their plants in making beer for exportation from the state was not decided.

Even Judge Field's dissenting opinion finds fault only with that portion of the law declaring the places a nuisance where the manufacture is carried on without permits, and directing the destruction of both the liquors and the containing vessels. He thinks this an unconstitutional deprivation of property. The answer of Judge Harlan that the law is prospective in its operation and relates only to places where the business shall be carried on in defiance of the state after its taking effect, seems to dispose of this objection if, as

Justice Field admits, the state had the general power to prohibit such use of property.

Two propositions not very distinctly advanced seem to have settled this case—one, that of Barbier *vs.* Connelly, that the fourteenth amendment takes away none of the police power of the state, and the other, established by an overwhelming agreement of state authorities, that forbidding the making or sale of intoxicants is a proper exercise of that power by a state, and if prospective in its operation requires no compensation for damages caused by it. The case becomes interesting as furnishing a basis for estimating the relative weight in the Supreme Court of limitations on state power derived from bills of rights, as compared with those derived from the transfer of power to the federal government.

In [1]Pembina, Etc., Company *vs.* Pennsylvania we have a new application of the rule of Paul *vs.* Virginia, that a state may exclude all corporations organized by other states or countries except those engaged in interstate commerce under the authority of Congress. A Pennsylvania tax of one mill on each dollar of capital stock of foreign corporations as a condition for opening an office in the state was upheld on the ground that since they could exclude the foreign company the Pennsylvania legislators might say on what condition it could come in.

In [2]Dow *vs.* Beidelman the question of the power of the legislature of the state to fix rates of railroad transportation was passed upon. The question was found in this case to be uncomplicated with any other as to reasonableness or affecting interstate commerce or charter rights, and the power was upheld with no dissent. The discussion by Judge Gray of the dissensions in the court over other similar cases is extremely interesting, but he finally concludes that none of these disputed propositions arise in the case under consideration.

A case in which the same unanimity by no means prevailed was [3]Powell *vs.* Pennsylvania. In 1885 Pennsylvania had passed an act that no person should make, or sell, or offer, or have in his possession for purposes of sale any article designed to take the places, or made in imitation of butter or cheese; that no action should be maintained for the price of such an article, and that the person found

[1] *125 U. S.*, 121 (March, 1888). [2] *Id.*, 680 (April, 1888).
[3] *127 U. S.*, 678 (April, 1888).

guilty of violating the act should be fined not less than one hundred or more than three hundred dollars or be imprisoned not more than thirty days or both.

Powell was indicted for selling two packages of imitation butter and for having in his possession for sale one hundred pounds of imitation butter.

It was agreed that he sold two packages and sold them as butterine and not as genuine butter, and that both were stamped on the lid in Roman letters half an inch long "Oleomargarine Butter." Powell offered to prove by Prof. Hugo Blanck that the latter saw the substance in the two packages made; that it was from pure animal fats, was clean and wholesome; that it contained the same elements as natural butter except that the latter has from three to seven per cent. butterine and the manufactured article only from one to two and a half; that the only effect of the additional butterine was to impart flavor and that the article sold was a healthful and nutritious article of food, as wholesome as butter from pure milk or cream.

He also offered to show that he was in the grocery business; that the two packages were a part of a large quantity of the article which he had on hand when the law was adopted and whose value would be destroyed if he was not permitted to sell it, and that the law was unconstitutional as depriving of property without compensation. All his offers of proof were rejected. He was found guilty and fined one hundred dollars. The sentence was affirmed by the Pennsylvania Supreme Court and a writ of error obtained from that of the United States.

In an opinion by Justice Harlan the sentence was affirmed and the law pronounced a valid exercise of the police power. The grounds given are dislike to interfere with any action of the state upon its own citizens, ostensibly for a public purpose, in preventing frauds and the sale of dangerous articles of food, and inability to say that such purpose was not subserved by the law. Almost in the same terms as used by Chief Justice Waite in Munn *vs.* Illinois, Justice Harlan says:

"If this legislation is unwise or oppressive, the appeal is to the legislature or to the people at the polls."

"Nevertheless, if the incompatibility of the constitution and the statute is clear or palpable, the courts must give effect to the former, and such would be the duty of the courts if the state legislature, under the

pretense of guarding the public health, the public morals, or the public safety, should invade the rights of life, liberty or property, or other right secured by the supreme law of the land."

Justice Field's dissenting opinion does not quite do justice to the position of the court in saying that the constitutionality of this legislation is rested solely on the fact that it pleased the legislature to pass it.

It is rested also on the fact that in the judgment of the court oleomargarine might be and perhaps generally was both dangerous and fraudulent, and the defendant had only offered to show the contrary as to his own article. To be sure, it would be very difficult for Powell to show that frauds and unwholesome compounds did not prevail outside of his factory, and the requirement of proof of such a negative does amount practically to an affirmation of anything the legislature might do, and would seem to furnish ground for Justice Field's complaint that this law missed the distinction between prohibition and regulation. It prohibits wholesome and undisguised manufacture as distinctly as it does the dangerous and fraudulent.

The doctrine in [1]Yick Wo *vs.* Hopkins that a police law affecting property values must be reasonable as a regulation might, it would seem, have been invoked here, and the case of [2]People *vs.* Marx, which reached a diametrically opposite conclusion, followed. We shall see this law and the interstate clause of the constitution arrayed against each other presently with different results.

In the matter of railroad regulation, we have seen in the case of [3]Wabash, St. L. & P. Ry. Co. *vs.* Illinois greater stringency in applying to state legislation the limitations imposed by federal supremacy as compared with that shown in the Granger cases in applying the constitutional provisions as to the rights of property owners. The greater strenuousness of the court in defending the sovereignty of the central government than in defending individual or property rights has been often commented upon.

There seems to be something of such a contrast. The reason is doubtless to be sought in the fact that in applying the federal restrictions the court is following a new path, and has no guide but the language of the constitution and the fact, remarked by Chief

[1] *118 U. S.*, 356 (1886). [2] *99 N. Y.*, 377 (1885).
[3] *118 U. S.*, 557.

Justice Marshall, that it is a constitution which is to be interpreted. In the other case of individual rights the language of the constitution is expressly held to have been adopted, in view of the interpretation of those rights by the common law and their real extent to be determined by legal precedents.

In applying the commerce clause, too, the fear of mutually hostile action on the part of the states, which has been before mentioned as the real motive for the adoption of the constitution, not only fixed the color of all the early precedents on this subject and established a tradition, but has actively operated ever since, and with good reason as many state enactments show.

The interstate commerce clause of the federal constitution was however vainly invoked in the case of [1]Smith *vs.* Alabama. The Supreme Court of that state had affirmed a judgment dismissing *habeas corpus* proceedings brought by Smith, a locomotive engineer, who had been arrested for driving a locomotive on a regular passenger train of the Mobile & Ohio Railway Company from Mobile, Ala., to Corinth, Miss., being sixty miles in Alabama and two hundred and sixty-five miles in Mississippi. At Corinth he took charge of a through train from St. Louis and brought it back to Mobile, drawing both ways express and mail matter and passengers destined for different states.

He had been committed to jail for violation of the provisions of an Alabama law requiring an examination and a license to authorize an engineer to engage in such an employment. It was admitted that he had not taken the examination nor procured a license for driving a locomotive, and that the law provided a penalty of not less than fifty nor more than five hundred dollars for engaging in such employment in that state without the license. The law was claimed to be void as being a regulation of commerce and so an infringement on the exclusive power of Congress.

The court in an opinion by Justice Matthews finds the law valid and that the state had such power over persons in its jurisdiction whose business was interstate commerce:

"There are many cases where the acknowledged powers in the state may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations. If their operation and application in such cases regulate such commerce so as to conflict with the regulation of the same subject

[1] *124 U. S.*, 465 (1888).

by Congress, either as expressed by positive laws or implied from the absence of legislation, such legislation on the part of the state to the extent of such conflict must be regarded as annulled."

He cites [1]Sherlock *vs.* Alling to the effect that the general test is whether the state law acts and is intended to act directly on interstate or foreign commerce or only indirectly in the accomplishment of some other genuine and proper purpose of local government.

He finds that contracts and liabilities of the carrier, though made in the actual process of interstate commerce, are governed by the law of the state where they are made, and if the state could secure civil remedies for a failure to provide a competent engineer and for damages resulting, it surely ought to be able, by way of provision in advance for the safety of its citizens, to apply reasonable penalties for the same purpose.

Perhaps Judge Miller's argument as to the need of a uniform regulation, advanced in the case of Wabash, St. L. and P. Ry. Co. *vs.* Illinois, would be available here also. There might, conceivably, be as much difficulty in getting a direct passage through different states, each exacting a different qualification to enable the engineer to make up his run, as there would be in getting through states prescribing different rates of transportation. Justice Bradley dissented without filing an opinion. It is impossible not to regret that he did not show the close resemblance in principle between this and the Wabash case and the difficulty of distinguishing them.

The sequel to [2]Mugler *vs.* Kansas now appeared. The court in that case had refused to say whether a state could prohibit the manufacture of intoxicating liquors within its borders for purposes of exportation. J. S. Kidd was the owner of a distillery in Polk county, Iowa. In December, 1885, Pearson and Loughran made complaint against him that his distillery was used for the unlawful manufacture and sale of intoxicating liquors and should be abated and such use forever enjoined.

The Iowa law was substantially the same as that of Kansas under consideration in Mugler's case. The petition for injunction alleged, after reciting manufacture and sale for unlawful purposes in the distillery, that Kidd there

"manufactures, keeps for sale, and sells within this state and at the place aforesaid intoxicating liquors to be taken out of the state and

[1] *93 U. S.*, 99.

[2] Kidd *vs.* Pearson, *128 U. S.*, 1.

there used as a beverage and for other purposes than for mechanical, medicinal, culinary and sacramental purposes, contrary to the statutes of Iowa."

Kidd answered that he held a license to manufacture and sell intoxicants, except as by law prohibited, and had at all times complied with the law.

At the trial it appeared that no sales were made in the state of Iowa; that all the liquors were for exportation and were sold outside of the state. A decree was entered abating the distillery as a nuisance and enjoining any further manufacture of intoxicating liquors in it. This decree having been affirmed by the Iowa Supreme Court, a writ of error was obtained from Washington. The state court had held that the statute had permitted the sale of imported liquors in the original packages, but that intoxicating liquors might be made in the state only for the purposes allowed by the law, and transportation and sale beyond the state was not among them, and that as thus construed the law did not conflict with the federal constitution.

The federal court found two questions in the case:

First. Did the statute so construed conflict with the commerce clause of the federal constitution?

Second. Was it in violation of the fourteenth amendment as depriving of property without due process of law? The last question is held to be disposed of by the case of Mugler *vs.* Kansas.

The other question is elaborately discussed by Justice Lamar, though he declined to admit there was any difficulty in the case. His proposition is that no power of Congress may attach to that which has no lawful existence in the state; it having been held that the state may without infringing on the liberty of its citizens forbid the manufacture, and having done so that disposes of the matter and there is no question of commerce concerned.

The contest in [1]Coe *vs.* Errol between the taxing power of the state and the commerce clause and the opinion of Justice Bradley in that case are referred to with the remark that the police power of a state is as full and plenary as the taxing power.

The insufficiency of logic in this matter to establish a practical rule has never been better shown than by a comparison of this case with that of [2]Bowman *vs.* C. & N. W. Ry. Co. The police power

[1] *116 U. S.*, 517. [2] *125 U. S.*, 465.

wins at this end as completely as it was overthrown at the other. That case held that the police power of the state of Iowa under this same law could not interfere with the bringing of intoxicating liquors into the state by attaching any conditions whatever to such coming. That is to say: Citizens of other states had an indefeasible right, as against the state authorities, to find a selling place for such articles in Iowa. By this case the making and taking to other states and there selling the same articles is held to be under the control of the state authorities. That is, those citizens of other states who have so sacred a right to sell liquors in Iowa that all the state's authority may not even affect it, have no right to buy any there for any purpose and the state may absolutely forbid its being made there for them, all simply because Congress is authorized by the federal constitution to regulate commerce.

In [1]Kimmish *vs.* Ball the police power prevailed again over the commerce clause. We have seen in [2]Railroad Company *vs.* Husen a Missouri statute forbidding the introduction of southern cattle during the warm months set aside because it made no distinction between sound and diseased stock. In Kimmish *vs.* Ball nearly the same law of the state of Iowa is upheld upon some distinctions. It had been discovered that there was a real danger to be apprehended from healthy southern cattle during the warm portions of the year.

In [3]Minneapolis & St. Paul Railway Company *vs.* Beckwith, in reaffirming that a railway company which has failed to fence its line may be held liable for twice the value of stock injured by passing trains, the court asserted once more that corporations were protected as persons by the fourteenth amendment, and that the amendment does not limit the subject or extent of the state's police power. In the case of [4]Nashville, C. & St. L. Ry. Co. *vs.* Alabama the case of Smith against Alabama was reaffirmed, with the additional feature that requiring railways to pay the expenses of examinations of employees under a state statute is not an unconstitutional deprivation of property. In [5]Eilenbecker *vs.* District Court, Plymouth county, the Iowa liquor laws came back again. Eilenbecker had been in prison for contempt in not obeying an injunction against his selling intoxicating liquors. A rule

[1] *129 U. S.*, 217 (Jan., 1889).
[2] *95 U. S.*, 465 (1877).
[3] *129 U. S.*, 26 (1889).
[4] *128 U. S.*, 96.
[5] *134 U. S.*, 31 (1890).

issued; there had been a hearing without a jury, he was found guilty of contempt and imprisoned. This proceeding was found to be in no respect a denial of equal protection of the laws; the right to punish for contempt is found to be inherent in all courts of superior jurisdiction, and

"to accomplish such a purpose as a suppression of the liquor traffic, the legislature is warranted in calling on any or all established powers of the courts."

In [1]Chicago, M. & St. P. Ry. Co. *vs.* Minnesota, the process of limiting the principles of the Granger cases continued. In 1887 the legislature of the state of Minnesota established a railroad commission and authorized it to establish rates of transportation. It required carriers to publish rates of tariff, which were not to be changed without ten days' notice.

Such charges were to be submitted to the commissioners, and if found unreasonable they should change them and should ascertain a just and reasonable charge which the carrier should adopt, and if the latter should not do so in ten days the commission should publish and post it in all stations of the carrier and it should be unlawful to charge any other rate than the one prescribed. The commissioners were empowered to obtain writs of mandamus and of injunction to put rates into effect and to stop all business of the carrier until they were complied with.

June 22, 1887, the Boards of Trade Union of Faribault, Farmington, Northfield and Owatonna complained that the charges of the railway company for carriage of milk from those places to St. Paul and Minneapolis were unjust, being four cents per gallon from Owatonna and three cents from the other places. The commissioners forwarded a copy of the complaint to the company on June 29, and required an answer by July 13. On that day the parties appeared, and the complaint was investigated. The commission found the rates unreasonable, and that two and a half cents per gallon was a sufficient charge. The company was notified, as the law required, in what respect its rates were unreasonable, and of the finding to which it was expected to conform. It refused. On October 13 the commissioners published and posted their tariff, and on December 6 made application by the attorney-general to the Supreme Court of the state for writ of mandamus against the railroad company to put the reduced rate into effect.

[1] *134 U. S.*, 462.

The application set forth the proceedings; that the former rate was unreasonable and excessive, and more than was charged elsewhere in the state for like service, and unjust discrimination. An alternative writ was issued, and a return made by the company that neither legislature nor commission had authority to fix rates; that the owners of the road alone had such authority, and the attempt of the commission to do so was taking property without due process of law.

It claimed that its own rates were reasonable, and any attempt to reduce them would deprive it of reasonable compensation for its service. At the hearing the company asked for a reference to take testimony as to the reasonableness of its charges. This was refused, and a peremptory writ of mandamus issued establishing the rates fixed by the commission and awarding costs against the company.

The case was taken to the federal Supreme Court. The state court had construed the statute to mean that the commission's rates were final—not advisory nor *prima facie* reasonable, but conclusive—and held the act valid on such construction.

The railway contended that it held by charter the right to make its own rates of toll. The federal court, however, held that the charter rights of the company were all held subject to any valid legislation of the state.

As to the claim, also made by the company, that the acts of the commission were an unconstitutional deprivation of property without due process of law, the court held itself bound by the construction of the statute made by the state court, that the orders of the commission were final and conclusive if the law was valid, and says:

"It deprives the company of its right to an investigation by due process of law under the form and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of the matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission, which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice." . . . . "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination."

Justices Bradley and Gray and Lamar dissent. Justice Bradley finds it a practical overruling of the Granger cases, all of which had asserted his own doctrine that the determining of the reasonableness of rates is a legislative question.

The concurring opinion of Judge Miller is interesting. He thinks the cases should be reversed because of the refusal of the state court to hear evidence as to the reasonableness of the company's rates. He thought it the province of the legislature to fix rates, but not arbitrary nor unreasonable ones. He thought that when an unreasonable rate was established by state authority the remedy was by a bill in equity to set aside the unreasonable action.

The "commercial power," to use the established phrase of the court, came in collision with the police power once more in [1] Leisy *vs.* Hardin, and this time held the field.

Plaintiffs, citizens and residents of Illinois and constituting the firm of Gus Leisy & Co., replevined from A. J. Hardin, marshal of Keokuk, Iowa, and *ex officio* constable, by an action in the Superior Court of that city, one hundred and twenty-two one-quarter barrels, one hundred and seventy-two one-eighth barrels and eleven sealed cases of beer. He had taken it on behalf of the state of Iowa in accordance with the provisions of Iowa statutes.

On agreement of facts, a jury being waived, the court found that plaintiffs were a partnership, citizens of Illinois, located at Peoria, engaged in brewing and selling beer in Iowa and Illinois; that this beer was made by them, put in kegs and cases at Peoria, sealed up and a United States revenue stamp of the customs district where Peoria is located placed on each package, and to open them the seals must be broken; that they shipped the property from Peoria to Keokuk; that it was there offered for sale in original packages in a building owned by one of plaintiffs by their agent; that defendant seized the property on a search warrant, issued by a justice of the peace in Keokuk upon a sworn complaint charging the keeping of intoxicating liquors, in violation of Iowa laws; and further finds that the laws mentioned were unconstitutional and void; and that on July 2, 1888, the plaintiffs filed their petition claiming ownership of the beer, and that the warrant under which it was taken was void, as being in violation of section 8, article i, of the constitution of the United States, and, filing their bond in replevin, obtained the beer.

[1] *135 U. S.*, 100 (April, 1890).

From the foregoing facts the court finds the following conclusions:

"That plaintiffs are the sole and unqualified owners of the property, and entitled to the possession of the same and judgment for one dollar damages for their detention and costs of suit. That so much of chap. vi, tit. ii, Code 1873, and the amendments thereto, as prohibits such sales by plaintiffs as were made by them is unconstitutional, being in contravention of section 8, art. i, of the constitution of the United States."

The judgment on this finding was reversed by the state Supreme Court, and judgment rendered against the plaintiffs on their replevin bond for the value of the beer.

The Iowa laws have been somewhat described in the account of the cases of Bowman *vs.* C. & N. W. Ry. Co. and Kidd *vs.* Pearson. No one in person or by agent might manufacture or sell intoxicants except for medicinal, mechanical, sacramental or culinary purposes, and all liquors intended for other purposes and vessels containing it are declared a nuisance and directed to be seized and destroyed.

The Supreme Court, in its opinion by Chief Justice Fuller, overrules the License cases on the ground that Chief Justice Taney did not sufficiently distinguish between

"the exercise of power over commerce with foreign nations and among the states and the exercise of power over purely local commerce and local concerns."

He relies on the opinion in Bowman *vs.* Railway Company. That case held that intoxicating liquors could lawfully come in despite any legislation of the state. Applying Brown *vs.* Maryland, he thinks the right to import involves the right to sell, and so holds the forbidding of the sale unconstitutional.

The police power, in its own admitted field, where, as Judge Miller says,

[1] "the legislature has the right to call on all powers of the court at common law or in chancery for the suppression of this objectionable traffic,"

had now come in collision with the "commercial power," and

[1] Eilenbecker *vs.* Dist. Court, *134 U. S.*, 31.

had to give way. The commercial power in its "dormant condition," as Chief Justice Marshall calls it, proves the stronger.

It would seem that an admission of the impossibility of making any but a practical division of the field of government between these two contending powers, and a declaration of the paramount character of that of Congress when it should become necessary to apply it, such as Taney had made in the License cases, would have been more judicious and quite as judicial. Subsequent legislative action by both Congress and the states and later decisions seem clearly now to show this. The determining on what conditions beer should be sold in the towns of Iowa would certainly seem more of a local than an interstate or international matter.

If it be said that with permission to the states, in the absence of Congressional action, to exclude intoxicants they might exclude other things also and stop commerce, it may be answered that no such alarm was felt in the case of Kidd *vs.* Pearson. Nobody grew afraid that, if the state was permitted to stop the making of liquors for export, while permitting them to be made for certain home uses, it might go on and forbid the making of other things for export, either generally or to particular states, and so put an embargo on outgoing commerce.

The fourteenth amendment can be relied upon to prevent any such promiscuous interference with the rights of the people. Besides, we have section 2 of article iv of the constitution, that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states. Chief Justice Marshall had given the true precedent in [1]Wilson *vs.* Blackbird Creek Marsh Company.

Justice Gray in his dissenting opinion, by the abstract he gives of the [2]License cases, shows even more clearly than those opinions themselves how the position had changed since 1847. The real question then under discussion was not the validity of the laws—all agreed on that—but whether Congress had the power to act if it wished; whether it was not so exclusively a matter of state regulation that Congress could not touch it. Now the question was whether it was not so exclusively a matter of commercial regulation that the state must keep hands off, and the latter was the conclusion.

While Judge Gray cites some cases holding that the police power

[1] *2 Pet.*, 245 (1829).

[2] *5 How.*, 504 (1847).

excludes that of Congress wherever the former really obtains, he himself makes no such claim. He ventures no more than to take Chief Justice Taney's position and that of Chief Justice Marshall in Wilson *vs.* Blackbird Creek Marsh Company, that the states may act, but not contrary to the express will of Congress. He hardly suggests that there ever was a question as to which should prevail in a real conflict.

At the same term, in [1] Minnesota *vs.* Barbour, another police law was held bad as an infringement on the domain of Congress. Henry E. Baker was convicted before a justice of the peace in Ramsey county, Minnesota, of selling for food one hundred pounds of fresh beef, part of an animal killed in Illinois that had not been inspected and certified healthy before slaughter, as required by Minnesota statute. He procured a writ of habeas corpus from the United States Circuit Court, and was discharged on the ground that the Minnesota statute was an infringement on the constitution of the United States. The state authorities appealed.

The law prohibited any sale of fresh meat for human food unless within twenty-four hours before its slaughter it was inspected and found in a suitable condition and a certificate to that effect given by the state inspector. The court held that it was not a matter of common experience of which it would take judicial notice that animals destined for food required to be inspected on foot just before being slaughtered. The law was held bad as being an effort to exclude meats from other states and not warranted by any necessity of police.

At the same [2] session the court refused to issue a writ of habeas corpus for Kemmler. He had been condemned in New York to suffer death by an electric shock. He claimed that this was an unconstitutional punishment, but the court declined to hear him.

In the case of [3] Rahrer an application for a writ of habeas corpus was made in the Circuit Court of the United States for the District of Kansas by Charles A. Rahrer, claiming that he was detained by the sheriff of Shawnee county in that state in violation of the federal constitution. It appeared that Maynard & Hopkins, wholesale liquor dealers of Kansas City, in June, 1890, appointed Rahrer their agent in Topeka, Kan., to sell their liquors in the "original packages" in which they were shipped, and in July of that year

[1] *136 U. S.*, 313 (1890). [2] *Id.*, 436 (1890).
[3] *140 U. S.*, 545 (1891).

shipped to him at that place a carload of liquors. August 9, 1890, he sold from that carload a keg of beer which was a separate and distinct package as originally shipped, and also on that day he sold a pint bottle of whiskey, which was a "separate and distinct package enclosed in the original wooden box in which it was shipped." Rahrer owned none of the liquor, but was simply agent for Maynard & Hopkins.

Rahrer had been informed against properly and a warrant issued and he was then held by the sheriff. He was not a druggist and had no permit as such and had applied for none. The Circuit Court discharged him and the state authorities appealed. The act of Congress known as the "Wilson Bill," providing that liquors from other states should be subject on their arrival to the operation and effect of the laws of the state into which they were brought, enacted in the exercise of its police powers, "in the same manner and the same extent as if produced in that state," and should not be exempt by reasons of being introduced "in the original packages or otherwise," took effect one day before this sale took place. The Supreme Court held that Rahrer must answer to the state law.

Chief Justice Fuller describes the police power as

"the power to impose restraints and burdens upon persons and property in the conservation and promotion of the public health, good order and prosperity. It belonged originally to the states, has never been surrendered to the government nor directly restrained and is essentially exclusive."

Then Justice Bradley's position in Civil Rights cases, that the fourteenth amendment did not extend the sphere of congressional legislation, but only put a negative on certain action by the states and authorized Congress to enforce that negative as endorsed:

"In short, it is not to be doubted that the power to make the ordinary regulations of police remains with the individual states and cannot be assumed by the national government, and in this respect it is not interfered with by the fourteenth amendment."

After finding this police power of the states thus broadly defined exclusive, he finds the national power to regulate commerce also exclusive. But this time he puts this qualification into the description of national power: it is exclusive "when the subjects of that power are national in their nature." He, however, immedi-

ately abandons this position. The constitution, he says, by granting control of interstate commerce, made it free except as Congress shall impose restraint upon it, and the failure of Congress to regulate is an expression of will that commerce shall be free and authorizes no restraint by the states:

"If a law, passed by a state in the exercise of its acknowledged powers, comes into conflict with that will, Congress and the state cannot occupy the position of equal opposing sovereignties, because the constitution declares its supremacy."

He asserts a distinction in kind between "commercial power" and "police power," which, though

"quite distinguishable when they do not approach each other, may yet, like the intervening colors between black and white, approach so nearly as to perplex the understanding as colors perplex the vision in marking the distinction between them."

He quotes at length from Judge Catron in the License cases, but apparently without perceiving that Judge Catron, while holding to a concurrent authority of the states with Congress, thought that such authority could not be a portion of the police power, because, as he saw, the police power could not be at once sovereign and concurrent; and if he was going to make it a sovereign and "exclusive" power, as Chief Justice Fuller here defines it, he must keep it entirely out of that region where laws of Congress are supreme.

It would seem that Chief Justice Fuller and Justices McLean, Catron and Story were making a distinction where none exists. Force is force, and when applied at the same time to the same object for the same ends it does not avail much to call it police power when employed by state authorities and commercial power when applied by federal officers. Either one is sufficiently like the other that, in order to be effective, the other must be overcome or excluded.

Chief Justice Taney's perception, in spite of his prejudices and surroundings, of the identity and concurrent nature of these powers and of the necessity of federal supremacy is a grand triumph of logic and analysis. Chief Justice Fuller, in making them distinct in nature, has, while exalting the power of the state in words, made it subject wholly to that of the federal government. He finally makes of his "exclusive" state power one that goes or

stops as Congress wills. The justices who had dissented in Leisy *vs.* Hardin were justified in concurring in the decision but not in the reasoning of the Chief Justice.

In [1] Budd *vs.* New York the question in the Granger cases again came up with substantially the same result, the state law of New York fixing a maximum charge for elevator rates being sustained in the federal Supreme Court as it had been by the New York Court of Appeals. The noticeable thing now is the extent to which such statutes had prevailed, and the extensive citation of them and of state courts sustaining them which Judge Blatchford gives in the opinion of the court. They are from Ohio, Illinois, Alabama, Wisconsin, Kentucky, Pennsylvania, Massachusetts, Indiana, Nebraska, Mississippi, Maryland and New Jersey.

He holds that what was said in the case of Chicago & St. Paul Railway Company *vs.* Minnesota, that a hearing must be allowed as to rates, applies only to those fixed by commissions and not to those fixed directly by the legislature; but he does not venture to rest the case on this distinction, but rather upon the fact that no effort was made to show that the rates established by the state were unreasonable. Judge Brewer's dissenting opinion did not attack the reasonableness of the rates, but the fundamental right to establish any.

He thinks it an invasion of rights of property, as the monopoly, if there was one, was not created by law, and could be broken at any time by any one who chose to engage in the business of elevating grain:

"That property which a man has honestly acquired he retains full control of, subject to these limitations: First, that he shall not use it to his neighbor's injury, and that does not mean that he must use it for his neighbor's benefit; second, that if he devotes it to a public use he gives to the public a right to control that use; and, third, that whenever the public need requires the public may take it upon payment of due compensation."

It would seem that Justice Brewer at that moment recognized no right to take property in an emergency, no right of regulation for the sake of public order and convenience, no right of taxation, no general government control.

There is other authority as to the nature of property. Franklin was hardly a radical, but he [2] wrote in 1783:

[1] *143 U. S.*, 517 (1892). [2] Letter to Robert Morris, December 25, 1783.

"All property, indeed, except the savage's temporary cabin, his bow, his matchcoat and other acquisitions absolutely necessary for his subsistence, seems to me to be the creature of public convention. Hence, the public has the right of regulating descents and all other conveyances of property and even of limiting the quantity and uses of it."

It is not by accident or mistake that such control of the uses of property as is reasonable—that is, as, in the judgment of the court, the public need really requires—has been upheld.

In [1] People *vs.* Squire the application of legislative authority to electricity and electrical lighting was upheld. Squire was commissioner of public works in the city of New York. The electrical lines asked a mandamus to compel his permission to excavate and lay wires. The mandamus was refused by the New York courts, and the company brought the case to the federal Supreme Court.

In 1882 the company was incorporated for the purpose of constructing and maintaining telegraph and telephone lines and electric conductors for illumination under the sidewalks and streets of New York and Brooklyn, and owning the franchise for such construction and owning and disposing such real and personal property as was needed for the purpose. The telegraph law allowed such companies the use of highways provided there was no obstruction. A further provision required the obtaining of license before laying any line in city or village streets.

April 10, 1883, the common council of New York city gave the company permission to lay its lines underground through the city, subject to certain restrictions. On April 16 the company accepted the franchise and filed a map, as required, indicating the space and localities which it would occupy. A considerable sum was expended in preparations for work, but it did not get ready to excavate until July, 1886, when it applied for a permit to do so, which was refused, because in 1885 the legislature had enacted a law requiring the approval of a board of commissioners of electrical subways before such excavating was done, and such approval had not been obtained.

The company then brought its mandamus, claiming that the act of 1885 had no application to it under its charter and the agreement of 1883. The court held that the company was subject to the latter acts, that it had no absolute right, but only a qualified one, subject to the state laws. A requirement that the company pay the

[1] *145 U. S.*, 880 (1892).

expense of the commissioners' examination was sustained as a mere rule of the public service and not taxation.

That a state may by law change the rate of interest that a judgment is bearing was determined by a divided court in [1] Morley *vs.* Lake Shore & Michigan Southern Railway Company. One Morley had obtained, January 26, 1878, judgment for $53,184.88 against the railroad company for guaranteed dividends on a stock on another road which had been absorbed by it. This judgment was contested in higher courts of the state of New York, but finally affirmed, May 21, 1881, and an execution issued for the amount and seven per cent. interest.

The defendant company paid the amount with interest at seven per cent. per annum up to January 1, 1880, and six per cent. after that, and applied to have the judgment satisfied on the ground that on January 1, 1880, interest had been reduced by law in New York from seven to six per cent. per annum. The trial court refused this, but the Court of Appeals reversed such action, held the payment sufficient and the judgment discharged.

This action of the Court of Appeals was taken for review to the Supreme Court of the United States. The New York Court of Appeals had held that there was no special reference to a judgment like this in the law changing the rate of interest. The United States Supreme Court accepted that construction. So construed, did the law impair the obligation of the contract? Plaintiff's claim was that while the contract stipulated no interest, it was made under a law providing for seven per cent. per annum after payment became due, and that such law was a part of the agreement. It was also claimed that the judgment itself was a contract. Both contentions were denied.

Justice Harlan's dissenting opinion, with which Justices Brewer and Field concur, argues that the cases, as to what changes may be made in the law relating to remedies on contracts, sufficiently establish that this action of the state was an impairment of the obligation of one.

Yesler *vs.* Board of Harbor Line Commissioners[2] is a reminder of Chief Justice Shaw's decision as to harbor rights in Commonwealth *vs.* Alger, and Minneapolis Railway Co. *vs.* Emmons [3] is a

[1] *146 U. S.*, 162 (1892). [2] *Id.*, 646.

[3] *149 U. S.*, 364.

strong reminder of Thorpe *vs.* Rutland, and both serve to show how the old questions were brought back by the adoption of the fourteenth amendment, and the reference of these matters to the federal Supreme Court. The two cases are decided precisely on the lines of those old landmarks of the police power.

CHAPTER XIII.

GOVERNMENT VERSUS LIBERTY IN THE SUPREME COURT.

An examination of the police power involves the following of an extended discussion in nearly every important case, for it is still true, as it was in the beginning, that the raising of a serious question over this matter means a divided court and a judicial debate. It is not to be forgotten that we are here engaged with the very subject and department of law in which Bentham so vehemently assailed Blackstone.

"A task of no less intricacy was here to be traveled through than that of adjusting the claims of those two jealous antagonists, liberty and govment."[1]

A little investigation will satisfy any one, as it satisfied Bentham, that

"a more invidious ground is scarcely to be found anywhere within the field of politics."

So it comes that scarcely an important decision, as to the limits of the legislature's power in any direction where its employment is at all new, as to which the judges do not disagree.

Not, however, in the case of New York & New England R. R. Co. *vs.* The Town of Bristol.[2] The railroad company appealed from a decision of the state court upholding a law authorizing the railroad commissioners to peremptorily require under certain circumstances grade crossings to be removed and replaced. The case was not only affirmed but dismissed as raising no new question with Judge Miller's remark in Davidson *vs.* New Orleans,[3] that the fourteenth amendment could not be used

"as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in the state courts of the justice of the decision against him and of the merits of the legislation against him on which such a decision may be founded."

[1] *Fragment on Government*, Chap. iv, Sec. 15. [2] *151 U. S.*, 556.
[3] *96 U. S.*, 97 (1877).

The action of the court in declining to look into the claim of unreasonableness, put forward on behalf of the company, indicates that a *bona fide* exercise of the police power whose reasonableness, and, therefore, whose title to be set above the constitutional guarantees of individual rights, has been affirmed by the judiciary of the state of its origination, is also above such guarantees in the federal constitution. By the terms the chief justice uses, he confines such a prerogative, as did Justice Harlan in New Orleans Water Works Company *vs.* Rivers, to provisions for the safety, health and morals of the people.

He does not here any more than in Rahrer's case set the police power above the federal control of commerce. The lawyers approached the court on that side and found much comfort. In the application of the fourteenth amendment, however, there seems to be an increasing tendency to restrict it by means of the common law precedents. Even as to the commerce clause, we have just been told by the latest examiners of that subject that the validity of state legislation affecting commerce must ultimately become a question of the extent of the necessity in which its laws have their origin.[1]

It is impossible, however, not to feel the force of Justice Gray's complaint in his dissenting opinion in the original package case that the court set commerce above the morals, health and safety of the people. It seems to set commerce above personal and property rights.

In Lawton *vs.* Steele,[2] Chief Justice Fuller found himself compelled to dissent from a slight extension of his own doctrines just examined. It was applied to game laws instead of public health, morals and safety. Steele was a game and fish protector appointed by the fish commissioners of New York. He seized a quantity of Lawton's fish nets on the ground that they were maintained on state waters in violation of law and destroyed them as a public nuisance. Lawton sued for their value.

The nets when taken were for the most part in actual use and the rest had been just recently. This was in violation of the state law, which provided that any net for taking fish maintained upon any waters of the state was a public nuisance, and every game constable was directed to summarily destroy it, and no action was to be maintained against any person for its destruction. The act

[1] Guthrie, *14th Amendment*, 76.

[2] *152 U. S.*, 133.

forbade catching any game fish in the state waters otherwise than with a hook.

This law was assailed as depriving the citizen of his property without due process, as an undue restraint on liberty and an interference with the maritime jurisdiction of the United States. The trial court sustained this contention as to the first point and gave Lawton judgment for the value of his nets. The Court of Appeals, however, reversed this, sustained the law as a valid exercise of police power in the state and dismissed the action. To reverse this judgment the case was taken for review to the United States Supreme Court. In an opinion by Justice Brown the act is upheld as within the police power of the state. He finds not only that the state may interfere on behalf of the public health, safety and morals, but

"wherever the public interest demands it, and in this particular a large discretion is vested in the legislature to determine not only what the interests of the public require but what measures are necessary for the protection of such interests."

He proceeds to investigate the bounds of this discretion just as any other judge does, by looking at the decisions. He finds in Rockwell *vs.* Nearing,[1] a law providing for the summary sale of trespassing animals was held bad as a deprivation of property without due process of law. In that case an examination of the precedents had shown this not to be an ordinary way of punishing or guarding against trespasses by animals, so the constitutional provision ruled it out. The protection of game by means of a forfeiture and summary destruction of poaching appliances is a common exercise of governmental power, and so the constitutional protection of private property is no bar to its use in this case and he finds the law good.

He cannot forbear, however, expressing some scruples about the summary destruction of the nets without a trial. As to this, the precedents are extensively considered together. The refusal of the court to apply the constitutional provisions for trial by jury to petty offenses is cited, and the conclusion is reached that actual injustice can hardly occur under this act. If a party's property is wrongly taken he can replevin or sue for damages.

Chief Justice Fuller and with him Justices Field and Brewer dis-

[1] *35 N. Y.*, 302.

sent on the ground that the police power rests upon necessity and the right of self-protection, but private property cannot be arbitrarily invaded under the mere guise of police regulation, nor forfeited for alleged violation of law by its owner, nor destroyed by way of penalty inflicted upon him without opportunity to be heard. The chief justice suggests that the utmost limit of police power here was to sequester the nets from use till their unlawful character should be ascertained in some sort of a hearing.

The chief justice deprecates the use in the court's opinion of arguments as to the smallness in value of the property destroyed. It would seem that if police regulations are to be required to be reasonable, if the extent of police interferences with private rights as well as commerce are to be proportioned to the public emergencies, such consideration as the insignificance of the property involved should be allowed. That seems to be the point of view of most of the cases cited by Justice Brown.

If the state may take life, property, liberty and all to suppress insurrection, repel an invasion or meet a sudden danger by fire or flood, may it not also take a few nets if wrongfully employed, and it is reasonably necessary for the public interests, and do so in a like summary manner?

In Bremen *vs.* City of Titusville,[1] ten dollars was exacted of plaintiff for taking orders for crayon portraits, with frames for the same, to be manufactured in an adjoining state. The court held that this was a tax and not a police regulation and void as a burden on interstate commerce.

In Reagan *vs.* Farmers' Loan and Trust Company,[2] the question of railroad rates arose again. The state of Texas in 1891 had established a railroad commission and authorized it, and made it the duty of such commission to adopt all necessary rates, charges and regulations to govern and regulate railroad freight and passenger tariffs, to correct abuses and prevent unjust discriminations and extortion in rates and enforce the same by having proper penalties inflicted as prescribed in the law.

Something of a task, even when confined to a single state and one for whose accomplishment a number of more specific powers were conferred—to classify lines of road and kinds of freight; to establish reasonable rates in whole or in part as they should see fit. Notice and hearing for all railways concerned was required before

[1] *153 U. S.*, 289 (1894). [2] *154 U. S.*, 362.

adoption of any rate for such road, and the rate fixed was to be deemed conclusive as between the company and shipper. Any company dissatisfied with it might file a petition in any court of competent jurisdiction in Travis county, Tex., to have the rate or regulation set aside, and the commissioners and state attorney-general were to answer and the case be tried at once.

The commission established certain rates of tariff for transportation, and in April following the Farmers' Loan and Trust Company commenced action in the federal Circuit Court in Travis county, Tex., to set them aside and enjoin the commissioners from attempting to enforce them or any others.

It was in possession of the International & Great Northern Railroad by a receiver appointed in an action to enforce $15,000,000 of bonds of the company. It alleged that under the rates established the income of the road would be reduced below the amount necessary to pay interest on its indebtedness, which was three-fifths its cost, and the rates were unjust and unreasonable and the law unconstitutional.

The commissioners first answered and took some evidence, then withdrew their answers and demurred to the petition. The court found against them on the demurrer and perpetually enjoined them from proceeding in any manner under the law. They appealed to the federal Supreme Court, claiming: First, that the action would not lie because brought against the state; second, that their rates were conclusive, and, third, that such rates were reasonable and just, at least so far as the facts alleged indicated.

The first objection was promptly disposed of on Chief Justice Marshall's authority in Osborne *vs.* Bank,[1] and all the cases following it since, holding that where private rights are wrongfully invaded a claim to be acting by state authority on the part of the defendant does not prevent jurisdiction of the federal courts.

The Granger cases[2] are held to establish the right of the state by its legislature to fix transportation rates that shall be *prima facie* reasonable; the Railroad Commission cases and others since, especially Chicago G. T. Ry. Co. *vs.* Wellman,[3] to determine that such rates must be set aside if shown to be unreasonable.

Judge Brewer in the opinion finds that the rates fixed were objected to as a whole; that the court cannot fix rates, but only

[1] *9 Wheat.*, 738. [2] *94 U. S.*, 155.
[3] *143 U S.*, 339.

say whether those proposed are reasonable or otherwise, and he finds that the facts admitted by the demurrer show that the rates established did not pay the stockholders anything, nor even the interest charges on borrowed capital, which was about three-fifths of the cost of the road; that the reduction was about one-fourth from former rates and was unreasonable. He, therefore, set aside the rate but also the perpetual injunction. He finds the establishment of a too low rate is a denial of equal protection of the laws to the company and those whose capital was invested in it, but thinks the commissioners must be permitted to try again.

In Connecticut[1] a pharmacist licensed under state laws to follow that occupation found himself, in 1890, interfered with by a liquor law, forbidding all sales of intoxicants except under certain conditions and requiring every druggist to obtain a permit, and making the granting of such permit discretionary with the county board. The plaintiff Gray claimed that the law deprived him of privileges and immunities as a citizen of the United States. Alcoholic preparations being essential to his business, the law made that business subject to the arbitrary discretion of the licensing board. The court by Justice Field disallowed his claim without much discussion and without attempting to distinguish his case from that of Soon Hing *vs.* Crowley.[2]

In Hooper *vs.* California,[3] a law making it a misdemeanor to procure insurance of a foreign company which had not complied with the law of the state was upheld and found to be no interference with interstate commerce.

In Emert *vs.* Missouri,[4] a prohibition of peddling without a license was held to apply to one selling sewing machines made in another state, but which he had with him and was delivering them as he sold them. The logic which distinguishes this case from Brennan *vs.* Titusville,[5] the one holding that such a license law is not constitutional as applied to a canvasser for portrait orders, the goods to be made outside of the state, is notable.

In Plumley *vs.* Commonwealth of Massachusetts,[6] the oleomargarine question, over which the state courts divided, came up once more. The state of Massachusetts in 1891 enacted a law that no one should sell, offer or keep for sale any oleomargarine colored in

[1] Gray *vs.* Conn., *159 U. S.*
[2] *113 U. S.*, 703.
[3] *155 U. S.*, 648 (1894).
[4] *156 U. S.*, 296 (1894).
[5] *153 U. S.*, 289.
[6] *155 U. S.*, 461.

imitation of butter, with a proviso that the law should not interfere with sale of an uncolored article in a separate and distinct form, such as would advise the purchaser of its character. Inspectors were authorized and required to make complaints and enter all places where butter and its imitations were sold and take suspected specimens for analysis.

Benjamin A. Plumley, convicted under this act, sought a writ of habeas corpus in the state Supreme Court, claiming that he only offered for sale ten pounds of pure animal fats designed to take the place of butter; that it was made at Chicago by a firm of which he was agent, and that he offered it in a package in which it was sent; that the article and all made by the firm was wholesome, nutritious and palatable and a regular article of commerce; that the Massachusetts law violated both the fourteenth amendment and the commercial clause of the federal constitution and was repugnant to congressional legislation on the same subject.

The state Supreme Court found that oleomargarine is naturally of a light, yellowish color, and that the material in question had been colored to imitate butter; that the applicant had offered to prove his assertions as to the article, where it was made and his agency to sell it in original packages in Massachusetts, and was not permitted; that he had complied with the act of Congress as to its sale and it was plainly stamped as oleomargarine. His sentence was held valid and he remanded to custody.

By writ of error the case came to Washington. Justice Harlan for the court finds that the act of Congress as to oleomargarine was not intended to regulate interstate commerce, but to lay a tax, and, like other federal tax laws, has only that effect, and takes no authority away from the state. He finds such authority in the state over foods and their purity. He easily distinguishes the various cases, in which police objects were mere pretexts, from this one. But when he comes to Leisy *vs.* Hardin, he can only say that in that case the article offered was genuine beer and no imitation, and therefore the declaration in that case that no state can make an article prohibited which is generally accepted as an article of commerce does not apply to this one.

Of course, as we have seen, the case concedes that the article offered was wholesome and an article of commerce shipped from Chicago, where it was regularly produced in quantities, but Massachusetts had said that its color condemned it. Chief Justice

Fuller naturally dissented, and with him Justices Field and Brewer. The claim of police power in this matter becomes very slight when it is recalled that the act of Congress provides ample safeguards for the stamping of oleomargarine packages. All the state needed to do to guard against deception was to provide that its own citizens should not offer the substance except in such packages unbroken.

To determine, with all the refined subtleties that regulate the intercourse of independent states, how imitation butter shall be offered in village markets is a distinct feature of American jurisprudence. The real support of such determination is the sound one adverted to by Justice Harlan in the last paragraph of his opinion: the impropriety of overturning state legislation in the Supreme Court except in cases of real, if not of absolute, necessity. This time it saved Massachusetts from danger of eating colored oleomargarine contrary to the will of her legislature, though the doctrine was not applied to save the good folks of Iowa from imported beer.

The police power received another earnest attempt at "delimitation" from another point of view in the [1] United States *vs.* E. C. Knight Company. An act of Congress of July 2, 1890, provided that every contract, combination, in form of trust or otherwise, or conspiracy in restraint of trade and commerce among the several states, is illegal, and that persons who shall monopolize, or who shall attempt to monopolize, or combine, or conspire to monopolize, trade or commerce among the several states, shall be guilty of a misdemeanor.

The American Sugar Refining Company, having New York and New Jersey named as its principal places of carrying on its business of making, refining and selling sugar and its products, had, prior to March, 1892, obtained control of all the sugar refineries of the country, except of four companies in Philadelphia, which refined about one-third of the sugar used in the United States, and one in Boston, refining about two per cent. of it.

In March, 1892, the American Company bought all the stock of the four Philadelphia companies and increased its own capital stock by $25,000,000. There was no understanding or agreement to all sell at once on the part of the four companies. After the

[1] *156 U. S.*, 1 (Jan., 1895).

purchase, the Philadelphia refineries were operated in pairs for reasons of economy, and a little more sugar produced than before. The American Company bought them in order to

"obtain a greater influence or more perfect control over the business of refining and *selling* sugar in this country."

After such purchase the American Company refined and sold all but about ten per cent. of the sugar used in this country.

These facts were shown in an action brought by the Attorney-General of the United States to enjoin the consummation of the purchase by the American Company, generally known as the Sugar Trust, and to compel the restoration of the stock and franchises to the four companies. The act of Congress referred to provides for the punishment of persons violating it, and also for proceedings in equity in the United States courts to enforce its provisions.

The Circuit Court dismissed the action, and the government appealed it to the federal Supreme Court, and in an opinion by Chief Justice Fuller the decree of dismissal was confirmed. He did not think commerce a part of manufacture nor manufacture a part of commerce, nor that arrangements to control manufacture were combinations to interfere with interstate commerce. He, therefore, held the matter not within the power of Congress.

"It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed; for while the one furnishes the strongest bond of union, the other is essential to preserve the autonomy of the states as required by our dual form of government, and acknowledged evils, however grave and urgent they may appear to be, had better be borne than the risk be run in the efforts to suppress them of more serious consequences by resort to expedients of even doubtful constitutionality."

He finds the power to govern men and things within the limits of its dominion

"a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the constitution of the United States and essentially exclusive." . . . . "That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state."

The case of Kidd *vs.* Pearson, cited as to its argument that

manufacture is no part of commerce, is made largely the basis of the decision. In Chief Justice Fuller's view, the trust was a manufacturing organization, and with the control of manufacturing the states alone are concerned. He thinks the law carefully framed with a view to established principles in not professing to deal with monopoly as such, but only with combinations "to monopolize trade with foreign nations and among the states." He finds in the acts complained of no direct relation to commerce between the states or with foreign nations, and that the allegations of the distribution of the company's products among different states and of dealings with foreign nations show merely that "trade serves manufacturing."

The Chief Justice's use of Kidd *vs.* Pearson seems hardly a fair one. Justice Lamar's position really is that Mugler *vs.* Kansas had ascertained that intoxicating liquors were so far an exception among commodities that their manufacture could be forbidden without infringing on the liberties of a citizen; that their manufacture had been forbidden in Iowa, except for certain purposes, and that for any other purpose they had no lawful existence in that state and so could not become subjects of commerce there. That he would have applied the holdings of the same case to the manufacture of sugar is impossible to believe. Selling is as much a part of commerce as is buying, and manufacture is as closely connected with selling as is transportation with either. Justice Lamar's argument that with manufacturing as such Congress has nothing to do is merely incidental.

The dissenting opinion urges with great force that this is not a mere manufacturing organization, but also a buying and selling one. The very purpose for which it sought to control sugar manufacturing facilities was in order to control the market, and the trial court so found. What market? None other than the interstate market of this country, as the proof amply shows. The only object of controlling the production was for the express purpose of monopolizing foreign and interstate trade in the thing produced, to control the price by monopolizing the product. It attacks the implied assertion of the court's opinion that because the company is a manufacturing one it cannot also be a trading one and of a forbidden kind. Indeed, there seems implied in the court's opinion a doctrine that the trade activity of this trust cannot be regulated without affecting its manufacturing, and so Congress has no power.

Perhaps in no other case since the civil war is there a suggestion that Congress should not regulate commerce lest it trench on the police power.

It needs no extensive reading between the lines in both opinions to see that in each case the writer's real point of view is national expediency—the one fearing to have Congress venture into such a field, the other fearing the consequences of its not doing so. The cases and statutes dealing with contracts in restraint of trade and the state's power over them cited in this opinion would of themselves furnish material for a more extended work than this.

In [1] Geer *vs.* Connecticut we have another application of the case of Kidd *vs.* Pearson. Geer was convicted of having game in his possession for the purpose of shipment to another state, which is a penal offense in Connecticut. The conviction was sustained by the state Supreme Court, and taken on error to that at Washington. This case brought on another judicial debate. The law was sustained by a bare majority of the court, Justices Brewer and Peckham not sitting, and Field and Harlan dissenting.

The majority opinion by Justice White upholds the law by an ingenious argument that property in game is a qualified one; that the state has especial authority to say under what conditions it shall become perfect. From this, with a large array of citations from civil and common-law countries and states, the conclusion is drawn that the state may say on what terms game can be killed. Having prescribed one of them that it shall not be for shipment, it may prevent such shipment, and in that state no one can become possessed of such a property in killed birds as may be protected by the commerce clause.

The dissenting opinions find no difference in the ownership of game once killed and reduced to possession from property in other things, and declare the law bad as a palpable regulation of interstate commerce. Neither opinion ventures to assert that ordinary property can be forbidden to leave the state. A feature of this case is that in Kansas and Idaho similar laws had been held to be contrary to the federal constitution by state and territorial courts. Another feature is the duty which Justice White finds in a state to look after a food supply for the people to avoid the evils of scarcity.

In [2] Western Union Telegraph Company *vs.* James, a Georgia law fixing a penalty for failing to deliver telegrams promptly and

[1] *161 U. S.*, 519.

[2] *162 U. S.*, 650 (1896).

impartially, provided that addressee lived within a mile of the company's station or in a town or city where such station was situated, was held valid as an exercise of the police power, which the court declines to define, but describes as

"the general power of the state to enact such laws in relation to persons and property within its borders as may promote the public health, the public morals and the general prosperity and safety of its inhabitants."

In [1] Telegraph *vs.* Pendleton a law of Indiana, similar in its terms, was held to have no validity as to a message sent from Indiana to Iowa, Indiana having no authority to prescribe what shall be done in another state. In the Georgia case the law is held to apply to messages sent from beyond the state, on the ground that it does not necessarily affect the action of the company in any other state, nor establish any discrimination against non-resident companies.

In [2] Hennington *vs.* The State of Georgia the question was on a statute forbidding the running of freight trains on Sunday. This is sustained, although its effect might be to stop trains running across the state from and to other states upon that day. It is pronounced a police regulation and not one of commerce, though incidentally affecting that subject, and good "at least until Congress interferes."

Chief Justice Fuller and Justice White object that a state can make no regulation of commerce, and this act, which suspended it for one day out of seven, was certainly a regulation, and no police power could authorize an interference with that which the constitution made free except as Congress should limit it. Perhaps, feeling the force of this, the court, in its opinion by Justice Harlan, gathered a great array of state decisions as to Sunday laws, and of federal cases which uphold state laws affecting commerce, but not aimed at it.

In [3] Illinois Central Railroad Company *vs.* Illinois, on the other hand, a statute of Illinois which, as construed by the courts of that state, required the company to take its through passenger trains three miles out of their way to stop in the city of Cairo before passing into Kentucky and other states was held to be aimed at commerce and void.

[1] *102 U. S.*, 347 (1887). [2] *163 U. S.*, 299 (1896).
[3] *Id.*, 142 (1896).

In [1] Plessy *vs.* Ferguson the question was the constitutionality of a law requiring all railroad companies in Louisiana to provide equal but separate accommodations for white and colored passengers, and that no person be allowed to occupy seats other than that assigned, and requiring train officers to assign passengers their place according to race and color, and fixing a penalty for not obeying such assignments. Plessy had been assigned to a coach, but had insisted on taking one in which he did not belong. Such was the charge. It made no mention of his race. He made application to the Supreme Court of the state for a writ of prohibition to stop such proceedings against him, alleging that the law was unconstitutional. It held the law valid, and he procured a writ of error. He claimed to be seven-eighths Caucasian and one-eighth African; that the African admixture was not discernible, and that he was entitled to all the privileges and immunities of a citizen of the United States of the white race; that, so thinking, he took the white man's coach, was ordered to take another provided for colored persons, refused, and was ejected by the aid of a police officer. He claimed the act was contrary to both the thirteenth amendment and to that clause of the fourteenth which prohibits certain legislation on the part of the states. The statute was sustained. The court found that merely providing a separate car for colored people and requiring them to take it was not depriving them of any right secured by either amendment.

Justice Brown in the opinion cites a long array of decisions from state and federal courts upholding such enactments. Justice Harlan assails the act as a violation of liberty in not permitting white and black persons who desire to do so to travel together. He suggests that this law is not very consistent with the reiterated holding of the court that black and white jurors must be permitted to serve on the same cases, and suggests that some one may be proposing a law to separate them by some kind of a partition while so serving.

In [2] St. Louis & S. F. Ry. Co. *vs.* Matthews old principles return again in the holding that a state law making railway companies liable for all damages caused by fires starting from their locomotives is valid. The court finds that under the ancient law of England all persons were liable for damage arising from fires of their own lighting, and that the statutes in this country had uni-

[1] *163 U. S.*, 537 (1896).

[2] *165 U. S.*, 1 (1897).

formly declared such a liability on the part of railroad companies and the statutes were universally upheld.

In [1] Robertson *vs.* Baldwin we have another example of the current method of interpreting constitutions by common-law precedents. The doctrine is expressly declared that the federal bill of rights embraced in the federal constitution is like other bills of rights, to be held to refer to those rights as defined and established in the common law. From an exhaustive examination of the decisions, Justice Brown concludes that the contract of a seaman to remain in service may be enforced by summary process and by confining him, and that this does not constitute involuntary servitude. The cases cited go far back into history. The refinement to which he is forced in order to show that these summary proceedings are not cases in the meaning of the constitution is a striking example of how thoroughly precedents control the ordinary meaning of the terms in even the national constitution.

In [2] Allgeyer *vs.* Louisiana we have the latest definition, by high authority, of liberty. A law of that state provided a fine of a thousand dollars for doing

"any act in this state to effect for himself or another insurance on property then in this state in any marine insurance company which has not complied with the laws of the state."

Allgeyer & Company, exporters of cotton in New Orleans, made shipments to foreign ports and against them drew drafts. These drafts were frequently negotiated in New York. When so negotiated a policy of marine insurance was attached. They would notify the Atlantic Mutual Marine Insurance Company at New York that insurance was wanted and attach an order for it to the draft. The correspondent in New York getting the draft and order would obtain the policy and attach it to the draft and bill of lading before negotiation.

October 23, 1894, a notification was sent by Allgeyer & Company from New Orleans to the insurance company at New York that a marine policy for $3400 was wanted on one hundred bales of cotton, which were at that time in Louisiana for shipment. For this Allgeyer & Company were by the Louisiana state court required to pay the penalty of one thousand dollars, and they procured a writ of error from the federal Supreme Court.

[1] *165 U. S.*, 275 (1897). [2] *Id.*, 578 (1897).

That court reversed the case and held that the Louisiana statute, in attempting to exact a penalty for transacting business otherwise lawful merely because it was done with citizens of the United States outside of Louisiana, was unconstitutional. The court says, opinion by the chief justice, that the statute is

"a violation of the fourteenth amendment and of the federal constitution in that it deprives the defendants of their liberty without due process of law." . . . . "The liberty mentioned in that amendment means not only the right of the citizen to be free from mere physical restraint of his person, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper or necessary and essential of his carrying out to a successful conclusion the purposes above mentioned." . . . .

"But we do not intend to hold that in no such case can the state exercise its police power. When and how far such a power may be legitimately exercised with regard to these subjects must be left for determination to each case as it arises."

In Gladsdon *vs.* Minnesota[1] a statute of that state requiring railroad companies to stop every regular passenger train at all county seats on their lines, so as to let out and take on passengers, was held valid and not unreasonable with an extended citation of cases by Justice Gray. He distinguishes the case from Illinois Central Ry. Co. *vs.* Illinois by the fact that the requirement in that case was unreasonable and operated directly as a detention of interstate traffic.

Davis *vs.* Massachusetts[2] upholds the city ordinance of Boston prohibiting public speaking on public squares without a permit from the mayor. The court declined to consider any question of reasonableness or unreasonableness of such arrangements of the city in reference to its own parks.

In the 1897 term of the federal court there were seventeen cases involving the police power directly, and many others more or less indirectly involving it. It is not possible to even summarize them here. They introduced no modifications of doctrine, but many new applications. In Holden *vs.* Hardy[3] is one of the most inter-

[1] *166 U. S.*, 427 (1897). [2] *167 U. S.*, 43 (1897).
[3] *169 U. S.*, 366.

esting recent discussions of the police power in regard to a question as to which the state courts disagree. A statute of Utah forbade employment of workingmen for more than eight hours of the day in mining, smelting or refining and reduction of ores and metals.

Holden was convicted of employing one John Anderson to work as a miner ten hours a day. He claimed that the law deprived him and his employés of liberty; that it was class legislation, and also a deprivation of equal protection of the laws and of property and liberty without due process of law and of his privileges and immunities as a citizen of the United States.

The Supreme Court holds the law good, Justices Brewer and Peckham dissenting. Justice Brown, in the opinion by the court, reviews the history of the fourteenth amendment and, to a great extent, its application by the federal Supreme Court. He divides the cases into: First, those where legislation is claimed to have discriminated unjustly against some individual or class, and so deprived particular individuals of their fundamental rights, and, second, where the legislature has changed or abolished something which had been deemed essential to the administration of justice.

This is preliminary to a general survey of changes in procedure and substantive law in this century, among which he emphasizes mitigation in severity of punishments, emancipation of women, disuse of the grand jury, simplification of the law of real property and of the law of civil procedure. The definition of liberty in Allgeyer's case is approved as establishing a property right of contract, but Commonwealth *vs.* Alger is cited to the principle that no property right is above the police power when rightly used.

The prohibition of lotteries and of dealing in intoxicating beverages are instanced as late developments in the use of this power in relation to contracts. Citations of cases and statutes as to mines and mining are extensively given, and he concludes that, if safety can be required in appliances, reasonable hours of employment in the interest of health and morals may also. He declines to express any opinion as to the constitutionality of a general eight-hour law, but he thinks it allowable to establish it in the employment under consideration. Similar laws in many states are not upheld.

In Smyth *vs.* Ames[1] we have the last determination as to railroad rates. Freight rates established by the Nebraska legislature

[1] *169 U. S.*, 466 (1898).

were held unreasonable and therefore invalid. The decision in the Circuit Court had been by Judge Brewer along precisely the same lines as in Reagan *vs.* Trust Company, above. This was affirmed with no new suggestions, unless, perhaps, the one that a fair value of the property used must be the basis of any reasonable rate, and that this is to be determined from all the relevant circumstances in the case.[1]

In C., B. & Q. Railroad Company *vs.* The State of Nebraska, the rights of state and city in controlling streets is considered. A viaduct had been constructed in Omaha under a statute authorizing a division of expenses in such work between the railway companies and the city. It had been built as the result of an agreement between two companies jointly and the city. It became out of repair, and the city, under a new statute requiring the railroads to maintain such viaduct, assessed the cost of repairing against the roads. The court holds that although the city had originally agreed to bear two-fifths of the expense, there was no ground to hold that the city had parted or could part with its police power to require the roads to comply with the law as to repairing the street.

In Hawker *vs.* The People[2] the right of the state to prescribe the qualifications of those who may practice medicine was stringently upheld. The law forbade any one who had been convicted of a felony from practicing medicine. It was attacked on the ground that it was *ex post facto*, and provided an additional punishment after the commission of the offense. Hawker had been convicted of felony and had served his time of punishment before the enactment of the law. The court, however, says that the purpose of the act was to secure reliable service to the people in sickness and was not punishment. If some additional hardship is incidentally suffered by those who had previous to its enactment been convicted of crimes, as was the case with Hawker, such fact did not vitiate the law nor take away its application to them.

In [3]Rhodes *vs.* Iowa and [4]Vance *vs.* Vandercook Co., both decided May 9, 1898, the liquor laws came back again, in the former case the old dispute between the commerce clause and the state exercising its duty of police. The question was simply whether the imported "goods" or "evils," as the state law esteemed them, could be seized while in the possession of the transporting agen-

[1] *170 U. S.*, 57.
[2] *Id.*, 189 (1898).
[3] *170 U. S.*, 412.
[4] *Id.*, 468.

cies on reaching the state or only after delivery to the consignee. The latter is held to be the meaning of the "Wilson Bill." Justices Gray, Harlan and Brown dissent, in the first place because, they say, the police power of the state attached any way without help from the "Wilson Bill." In the next place they hold strenuously that when Congress said that the liquor should be subject to the state law on arrival within the state, those plain words indicated a plain intention and should be followed.

In Vance *vs.* Vandercook Co. the police power gave way before the commerce clause, but prevailed as against the fourteenth amendment. The South Carolina law stopping all private traffic in liquor and creating a state dispensary was in part upheld. The company was shipping wines from California to an agent in South Carolina to be sold in unbroken packages and asked an injunction against the agents of the state who threatened to take possession of the stock. The United States Circuit Court for South Carolina granted the injunction and the state officers appealed.

The year before in [1] Scott *vs.* Donald, in substance the same law of the state had been before the court, but was found bad on account of some minor discriminations against liquors produced in other states. The authority of the state to create such an agency and forbid all private sale was not passed upon. The law as now amended was objected to, first, as repugnant to the commerce clause; second, that in directing state officers to buy and sell all liquors in the state, the law forbade sales by others in the original packages; and, third, that the law hampers the shipping in of liquors to a citizen for his own use by conditions destructive of the right.

It was held that the state might establish its own dispensary, but could not require each resident ordering wines or liquors to furnish a sample of his proposed purchase to the state chemist and get a certificate of its purity. This was held not to be an inspection law as the liquor actually shipped was not inspected.

In [2] Schollenberger *vs.* Pennsylvania and Paul *vs.* Pennsylvania, oleomargarine triumphed with the aid of the commerce clause. The same statute, as in the case of [3] Powell *vs.* Pennsylvania, was under consideration, but this time instead of a home manufacturing plant to be rendered worthless, if the manufacture was forbidden,

[1] *165 U. S.*, 58.

[2] *171 U. S.*, 1.

[3] *127 U. S.*, 678.

the question was as to the sale of an "original package." Schollenberger had sold some oleomargarine for the Oakdale Manufacturing Company of Rhode Island, and his business in Philadelphia was selling it, as agent for that company. It was duly marked, and he had paid the United States tax for license to carry on the business and held such license. He was fined for selling a forty-pound package in the tub in which it was shipped.

Oleomargarine is found to be an article of commerce, and as no attempt to show its unwholesomeness had been made, and Congress had provided for its inspection and condemnation if found to contain unwholesome ingredients, it was presumed wholesome. The law which was good against Powell's personal right to pursue an honest calling, which was valid to beggar him by destroying the value of his plant, was powerless against the introduction of the same article from Rhode Island.

In Powell's favor were the express words of both state and federal constitutions guaranteeing him both liberty and property. In favor of the retailing agent there is only the implied prohibition contained in giving to Congress power to regulate commerce between the states. But that fear of commercial wars which caused the federal constitution is not behind the fourteenth amendment, nor behind any of the precedents by which it is construed. Justices Gray and Harlan forcibly dissent, relying on Plumley's case. They also dissent in the following case of [1] Collins *vs.* New Hampshire, where the court held bad for interfering with commerce a law requiring all oleomargarine to be colored pink before it was offered for sale. The court concluded that the law was simply intended to prevent the sale of the article. If such sale could not be directly prevented, as they had just held that it could not, it ought not to be done indirectly.

During the current term of the court in [2] Blake *vs.* McClung the right of the state to provide that its own residents shall first be paid out of the assets in the state of a suspended corporation was denied as contrary to section ii of article iv of the federal constitution, so far as individual citizens of other states were concerned, but upheld as to foreign corporations, with a vigorous dissent from Justice Brewer and Chief Justice Fuller.

By [3] Chappell Chemical and Fertilizer Company *vs.* Sulphur

[1] *171 U. S.*, 30. [2] *172 U. S.*, 239. [3] *Id.*, 472.

Mines Company, the right of the state of Maryland to provide that in the city of Baltimore, only, cases should be tried by the court, unless the jury is demanded by a specified time, was upheld as not denying equal protection of the laws.

In [1] Orient Insurance Company *vs.* Daggs, the right to require all insurance companies to pay the full amount of insurance in the event of the total loss of the property, regardless of its value, is maintained on the ground of the general right to prescribe the terms on which corporations may do business.

In [2] Wilson *vs.* Eureka City, an ordinance forbidding the moving of a building across a city street without permission of the Mayor is found not to give any unconstitutional or arbitrary power to the Mayor, on the authority of Davis *vs.* Massachusetts, notwithstanding a long array of cases from state courts, based on [3] *In re* Frazee, opposing arbitrary power in municipal officers.

In [4] Loan and Trust Company *vs.* Campbell Commission Company, the allowance of attachments against non-resident debtors without bond while requiring one as against residents, was sustained as not denying equal protection of the laws.

An Arkansas statute requiring immediate payment of all arrears in wages on discharge of an employee of a railroad company is upheld against a similar attack in [5] St. L. & I. M. & S. Ry. Co. *vs.* Paul.

In February, 1899, the question of the right of Ohio to require every railroad company in that state to stop at least three of its regular passenger trains in all towns of three thousand or more inhabitants through which so many trains of the road should run daily was held to be entirely within the police power of the state. The power is expressly held to extend not only to the public health, morals and safety, but to every thing that promotes public peace, comfort and convenience.

It is true that this is done by a bare majority of a divided court. It is to be noted again that the contention in the matter is not as to any violation of property rights or individual or even corporate liberty. The question is not raised as to the right of a state to make such requirements of its own citizens or corporations, but simply whether the commerce clause is in the way.

[1] *172 U. S.*, 557.
[2] *173 U. S.*, 32.
[3] *63 Mich.*, 396.
[4] *173 U. S.*, 84.
[5] *Id.*, 404.

The minority claim that such action is contrary to the dogma of exclusive power in Congress to regulate interstate commerce, and especially that it is inconsistent with Justice Miller's opinion in [1] Wabash, Etc., Ry. Co. *vs.* Illinois and the precedent on which that case chiefly rested, [2] Hall *vs.* DeCuir. The majority, however, deliberately extend the police power in matters affecting commerce to provisions for the public convenience and general welfare as well as for guarding public safety, health and morals. Justice Harlan in the opinion of the court says:

"It may be that such legislation is not within the 'police power' of a state, as those words have been sometimes, though inaccurately used, but in our opinion the power, whether called 'police,' 'governmental' or 'legislative,' exists in each state, by appropriate enactments not forbidden by its own constitution or by the constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and, therefore, to provide for the public convenience and the public good."

Such is the last decision of the federal Supreme Court as to that mixture of political theories and English and American precedents which by a series of events which have been sought to be outlined acquired the name of "police power," and has gone on forming new precedents. Brunetière declares that the greatest influence in developing new literature is always former literature. It is still more true that the greatest influence in shaping new decisions is earlier ones, and the final form any new principle will assume cannot be known till its adaptation into existing ones is accomplished. The mixing of the precedents as to the powers of crown officers and chartered municipal and trading corporations with theories of sovereignty and legislative functions, all adapted to the exigencies of American life, has brought the result which has been sought to be shown.

[1] *118 U. S.*, 557. [2] *95 U. S.*, 485.

CHAPTER XIV.

Conclusion.

The foregoing has been written quite in vain, and under a complete misapprehension, if there is any need of extended discussion of the relations of the police power decisions to the general growth of law. As to the police power itself enough and too much has been said. If that were the subject of examination the work might be as brief as the famous chapter on the snakes in Ireland, as compendious as De Tocqueville's remark as to the English constitution, "*Elle n'existe point.*"

It is not necessary to adopt Treitschke's oft-repeated declaration, that the state is force,[1] in order to conclude that "the police power" is a fiction. Every judge whom we have seen attempt to analyze it finds in it Madison's "indefinite supremacy" of the state. The doctrine of faculties and separate powers of the state may not be as essentially absurd as Treitschke thinks,[2] but in our case the term is certainly a mere abstract and collective one for the state, where regarded as employed in certain functions; and constant forgetting of this fact has made endless trouble.

Judges and lawyers need to recollect constantly that the police power is not an entity. They need to assure themselves of this quite as earnestly and as often as Claud Bernard found that physicians need a like assurance with regard to disease. This is obvious enough to have required no demonstration, and Justice Harlan's opinion, last February, in Lake Shore Railroad Company *vs.* Ohio, has done this work with satisfactory thoroughness, if it was needed.

If the whole significance of these cases has not been misconceived, the characteristic thing about this latest development in our jurisprudence is its unintended growth out of unconscious habits. Chief Justice Marshall dropped the seed without intending it. Justice Barbour picked it up without observing it, and until it had

[1] *Vorlesungen*, Vol. 1, 33–323; Vol. 2, 11–27, and elsewhere.
[2] *Id.*, Vol. 2, p. 3.

grown almost to its full size no one remarked it as anything peculiar. Then the process of identifying it with something quite ancient, with which it was only remotely connected, began.

The suggestion of Marshall's was put forward to serve a need to enable the slave states to minister to their "peculiar institutions," while the national authority was nevertheless enforced. It was done almost involuntarily by judges who used it because it lay at hand and was available. Then it was used in the states to resist extravagant claims of property and corporate rights and to extend restraints over the liquor traffic. After the civil war it was needed again for the same purpose to enable the states to maintain their autonomy against the reconstruction legislation of Congress and the new amendments; and, again, it was involuntarily seized upon and crowded into the gap.

In such use it so wrought upon legislation that it finally triumphed over the bills of rights almost completely, but the fourteenth constitutional amendment, almost wholly balked by our legal habits of its intended effect as to the negro race, was turned by those habits to the accomplishment of purposes in relation to property and legislation that the framers of it did not even remotely conceive.

We have here, then, an edifice which no one planned, which developed under the hands of learned and thoughtful men without their perception of it, took finally a form quite different from the thing that was meant, and all in regard to matters put forth in carefully devised constitutions, the result of the utmost deliberation. Is there in the history of jurisprudence a stronger exhibition of the overwhelming force of habit and circumstances in shaping law, as compared with will and intention? Does not this show, indeed, that law derives its contents from the needs of the community for which it serves?

Law, as Austin and Bentham thought, is established by the will of a lawgiver. That much may be granted, but the Supreme Lawgiver has ordained that it shall be maintained by habit. It becomes law in effect only by reason of its ability to transform the compliance with it from a voluntary and intentional act into an involuntary and effortless habit. The wisest lawgiver is unable to foresee how far he can do that, for two reasons. He is not thoroughly acquainted with his subject's habits, already formed, nor with their degree of persistence. He does not know what new forces may come to interfere with him. So it happened that Solon

found the brief years of his Asiatic journey sufficient to set aside nearly all those laws which his countrymen had sworn to observe forever.

It requires but a moment's reflection to recognize the overwhelming importance of habit in law. It is true that men do their actions in Schiller's "arrowy swift present." That action is controlled by the future or by the past, or rather by the resultant of the two. If the present event merely touches the springs of habit and starts an action like similar ones in the past, then that past controls. If the habit is firmly enough fixed and the action has been often enough performed, and no disturbing consequences are in sight, its recurrence is merely reflex and unconscious; less firmly fixed, it will be conscious and more or less adjusted to consequences. In those consequences and their perception lies the other force. The future works through them, and if they be clear and inevitable they speedily produce adjustments which themselves become habitual and may become unconscious. Witness those habits which enable man to employ fire, and the extent to which they are unconscious.

The theory of the common law, that the courts did not make but found it, has this basis of habit—a set of habits controlling alike judge, officer and parties. The judge's conception that his determination has been made for him beforehand, if he can only adjust the case so as to bring the former determinations to bear upon it, is much nearer truth than the fiction that Bentham thought it. Mankind are not all endowed with Bentham's passion for "utility." If they were, they would, like him, contract habits in its pursuit.

In dealing with the limitations of the powers of government in the states it is clear that we are dealing with habits. The real question attempted in this essay is, What are the habitual limits actually observed by the courts and adhered to in passing upon the rights of these parties who are contending on the one side that the legislature has gone beyond its powers, and on the other that its action is valid and has effected the intended alteration in the rights of the parties?

We perceive at once that precedents are much more than maxims; that actions speak louder than words. Legal habits on the one side and recognitions of utility on the other frequently leave very little of a high-sounding constitutional declaration, and as fre-

quently stretch an obscure implication into an absolute requirement of free trade between the states, which can yield to no police necessity for the suppression of the liquor traffic.

The actual contents of the law, the actual extent and power of government, is determined by the adjustment to each other of two sets of habits: the habits of those in authority in regard to its exercise and the habits of those in subjection as to obeying or resisting. Constitutional principles that have grown up out of the practice of a state and crystallized into an expression of habit are important so far as they indicate such habit. Provisions set up for their supposed utility are important only in so far as they create new habits, as we have so distinctly seen in the case of the fourteenth amendment.

What is here said is no deprecation of intelligence or of considerations of utility in legislation or government. Habits of legal action, like all others, are subject to modification, and the modifying influences are intelligence and perception of consequences, unless, indeed, with [1] Mr. Bagehot, we place imitation first. But stronger than the tendency to imitate anyone else is the tendency to imitate one's self. It is an invincible fact that when anything is to be proceeded with, it will be as far as possible along familiar lines, where the attention will not be so fatigued.

Mimicry will furnish a competing suggestion and introduce questions of consequences and utility, but the experiencing and prefiguring of consequences is the force that finally alters habit.

"It is the principle of utility accurately apprehended and steadily applied that affords the only clue to guide a man through these straits. It is for that, if any, and for that alone, to furnish a decision which neither party shall dare in theory to disavow."[2]

This principle may be accepted as the [3] "only one possible to follow in legislation."

But this "utility" will come in collision with established habits which now are such merely, and not only serve no generally useful purpose, but interfere with the attainment of some social end. It is for the lawgiver to remember that every habit can only be overcome by a substituted one. Every habit in its origin commences

[1] *Physics and Politics*, chap. 3, "Nation Making." See, also, Tarde's *Loi de l'Imitation*, which we would rather call "suggestion."

[2] Bentham, *Fragment on Government*, chap. 4, sec. 15.

[3] Maine's *Popular Government*, 166.

with a real or supposed utility. However totally reflex and involuntary the act may have now become, in the beginning some sort of desire gave the impulse. To overcome the habit that impulse must be steadily turned in some other direction. The perception of utility that is to be the guide must be clear and persistent enough to generate a habit before its object will be attained in establishing a law.

All this is not of necessity belittling to written constitutions. By crystallizing valuable habits they may help to fix the latter in the polity, and to preserve them against a change for supposed utilities that are not really such, and that is what Sir Henry Maine credits our constitution with doing. By putting the results of a habit into a general principle its utility may be more manifest and its safety against competing tendencies to change be thus better secured.

Generally, constitutional principles that represent real habits of action might be expected to prove ramparts of conservatism. Constitutional provisions that represent no settled habits will probably accentuate tendencies to change, and the result of the struggle may be something very far from that originally intended. Does our experience with the constitutional amendments since the civil war not clearly illustrate this? To quote [1] Bagehot once more, it is in the undiscussed parts of much-discussed subjects that their obscurities lie. In the discussion of laws, their nature, advisability and effect, it has usually been the conscious, the intended, the utilitarian part that has absorbed the attention—that is, the new has attracted all minds. That the old had left its marks and was going to continue producing its effects, no matter how carefully it was sought to obliterate it, has usually been more or less forgotten. This is true even where the infusion of new adaptations into old matter is a very small part of the whole.

But the new frequently proves in the end a strong leaven. So it comes that the immediate effects of political changes are disappointing, while ultimate consequences so far outrun expectations. Jefferson, in his disappointment at the working of the federal system in some respects, called the supreme judges a [2] "subtle corps of sappers and miners constantly working underground" to convert the constitution

"from a coördination of a general and special government to a general and supreme one alone."

[1] *English Constitution*, chap. 6.

[2] *Works*, vol. 7, p. 192.

Lincoln spent his best years and delivered his most notable public utterances in attacking the court for its decision in the Dred Scott case.

Yet a distinguished member of the court availed himself of a commemoration of Lincoln's birthday to claim the Supreme Court as "the bearers of the palladium of American liberty." And his claim must be allowed. Among the changes that have happened in a hundred years is that the court has become the refuge of Jefferson's individualism as against socialistic tendencies in the legislatures. In this they are in the line of the function of the courts in all ages: the application of habits and customs to the determination of the rights of parties.

In this application of old habits to new emergencies in the "decisions relating to the police power of the state," the maintenance of authority as against the letter of the constitutions is a general feature. In one notable respect this is not true. The right of contract, in a freer sense by far than was formerly upheld, is now asserted, and vindicated as protected by the guarantee of "liberty." We have seen this in Allgeyer's case in the federal Supreme Court. It is even more marked in numerous state cases. Except in this particular, as against the bills of rights, legislative action in any accustomed way, and in most new ones that can claim a real public utility as their purpose, is sustained.

Of any loss of real or needed authority through the action of the courts there is evidently no danger. While those "old antagonists, Liberty and Government," will continue their struggle in ever new and yet always old forms as the years go on, let us hope that to the courts of last resort will continue to be given wisdom and firmness to hold the scales even; with Marshall, to "both innovate boldly and preserve wisely," and so, like him, "have no steps to retrace." As to what has been done during the last century, if it has been found in this paper necessary to deny the existence of any "police power" as a separate entity, it has nevertheless been sought with all diligence to exhibit the decisions relating to it as they are. To paraphrase Comines' saying, "Je les ay fait le plus pres de la vérité que je l'ay peu."